ROGER B. TANEY: JACKSONIAN JURIST

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BY

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To

ETTA HART SMITH

THERE IS SOMETHING ABOUT
TANEY THAT YOU WILL LIKE

PREFACE

As THE STORY of Federalist thought and action is incomplete without John Marshall, so the story of Jacksonian Democracy is not complete without Roger B. Taney. Taney's place in the democratic movement has never been accurately appraised and the many implications of his theory are still to a certain extent unappreciated. Biographies of him have been written, but until now no one has attempted a thorough discussion of his political theory and his contribution to constitutional law. Both as a Jacksonian statesman and as an American jurist of high rank he deserves such a discussion. This book is an attempt to contribute something to this aspect of Taney's career.

I owe my thanks to Professor Everett S. Brown of the University of Michigan, who first suggested the possibility of this study and gave helpful advice at the beginning of the undertaking. I am indebted to Dr. Llewellyn Pfankuchen, of the University of Wisconsin, for carefully reading and criticizing practically the whole of the manuscript and for suggestions made at various stages of its preparation, and to Professor Ray A. Brown and Dr. John D. Lewis of the same University for helpful suggestions made in regard to particular chapters. I am grateful to my wife, Essa Esarey Smith, for discerning suggestions in regard to style and content and for help in proofreading.

CHARLES W. SMITH, JR.

Rutgers University
May 30, 1935.

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BIOGRAPHY

Introduction

ROGER B. TANEY was a Federalist who became a chief among the advisers of the rough hewn patron saint of democracy who ruled the United States from 1829 to 1837. Later as Chief Justice of the Supreme Court he wrote into the law principles which may properly be regarded as the legal expression of the democracy that is called Jacksonian. In fact, the political theory of Jacksonian democracy is more completely developed and more logically stated in Taney's writings and speeches than anywhere else.

With more vision than President Jackson, and a more coherent political theory, Taney looked to the great ends of government. In the inner circle of the Jacksonians, and out of it, he championed the course that led without compromise toward the realization of the ideal that assures to all citizens an equal share in the sovereignty of the state and equality of status before their government. He conceived of the law as a tower of refuge to which men might repair for protection equally in times of crisis and of peace. The defender of constitutional government, he was not afraid to define the powers of the state in broad free terms because he thought of the people as sovereign, and with the faith of the true democrat he saw no need for them to fear themselves.

On more than one occasion he stirred up great criticism and aroused hostility of the most bitter sort, but with the great end in view he went serenely on. The incidents of the present were not as important to him as the principles which he never lost sight of even in the midst of the storm. Because he was a man of consistence and of a stubborn courage

that utterly disregarded vocal public opinion he has gone down in history under a shadow. Few people know the truth about him. To the average man, who knows anything at all about him, he is the author of the Dred Scott decision. And this single fact suggests a nebulous shadow of iniquity. The great Jacksonian's contributions to democratic government have been forgotten. That, perhaps, is a penalty of his consistency and his lack of political finesse.

In order to understand how these things came to be, one must look into the background from which Taney came and to the surroundings in which he worked.

Taney's Early Life and Education

Roger Brooke Taney was born March 17, 1777 on a Maryland plantation. His father was Michael Taney, a planter politician and an avid reader who began planning very early a great career in law and politics for his son. His mother, Monica Brooke Taney, was a woman of unusual charm, sympathy and goodness of character. As her son, Roger, records: "If any of the plantation-servants committed faults, . . . they came to her to intercede for them; and she never failed to use her influence in their behalf, nor did she ever hear of a case of distress within her reach, that she did not endeavor to relieve it. I remember and feel the effect of her teaching to this hour [September, 1854]."[1] The kindness and consideration for the feelings of others that were typical of his dealings with his associates seem to have been the projection of these same traits in his mother's character and show to some extent the bond of understanding and sympathy between them.

Roger Taney's parents were Catholics, and for that reason their education had been influenced by the discriminative

[1] S. Tyler, *Memoir of Roger Brooke Taney,* pp. 26-27. All biographical material not credited to specific sources is from this volume.

English laws which had been put in force in the colony founded by Lord Baltimore. His father had been educated in France and although his mother came from a wealthy family of good social standing and some prominence, since she was a girl, she had had no formal schooling. The discriminations against the education of Catholics having been done away with by the American Revolution, it was taken for granted that the Taney children would be educated.

When Roger was eight years old, he was sent with his brother and sister to the nearest school, three miles away. Their attendance was irregular, because they walked to and from school and in bad weather had to stay at home. But Michael Taney was determined that his children should be educated, in spite of difficult details. Consequently, after an elementary education obtained in country schools and from a tutor employed by the family, Roger was ready, when fifteen years old, to go to college. His father decided to send him to Dickinson College at Carlisle, Pennsylvania.

The life of the young Taney at college was pleasant as well as highly profitable. He enjoyed sports and games and gladly took part in them, but he was at the same time a thorough student. He always prepared his lessons well. In addition, he liked books and read much more than was actually required by his teachers. This reading, he tells us, was "desultory, and some of it not wisely selected."

Outstanding among the four members of the Dickinson faculty of Taney's time was Doctor Charles Nisbet, president of the college. He taught ethics, logic, metaphysics, and criticism. Some of his lectures were on economic subjects, and included much that later came to be called sociology.[2] He was a brilliant scholar who had been persuaded to come over from Scotland to head the college at its beginning. He was not only a great scholar, but a devout and orthodox

[2] J. H. Morgan, *Dickinson College*, p. 110.

Calvinist as well. Although he was a man of firm convictions with a deep seated aversion to slipshod methods of work, he was also a man of charming personality. Taney and other students spent many evenings in the Nisbet home where they were charmed and instructed by Doctor Nisbet's discussion of a wide range of subjects. In the classroom Doctor Nisbet gave voluminous lectures, but he also encouraged his students to think for themselves and form opinions of their own.

Some idea of the rigor of the intellectual diet which he prescribed for his pupils may be gathered from a letter which he wrote to a friend in 1790. Referring to a group of students who were studying for the ministry under his guidance he said, "They promised to attend at least two Years, & longer if I should find it necessary. . . . I have delivered to them already three hundred & Seventy five lectures on the first 29 Chapters of the Westminster Confession of Faith, & I hope they will stay with me till I get through it."[3]

The old clergyman expressed his convictions with a fervor and a frankness that were sometimes impolitic. In Scotland he had made enemies by supporting the cause of the colonists during the American Revolution. In America he condemned the French Revolutionists with such ardor that he aroused the hostility of some of their American sympathizers. He had little faith in republican institutions and was very cynical about the ability of the Americans to maintain a stable and effective government. Taney and many of the other students did not copy down such sentiments when they were expressed in class. To them such ideas were rank heresy. In spite of what they considered his lapse on this one subject, Doctor Nisbet's students held him in high regard, and on many of them his character, as well as the opinions he expressed, made a profound impression.

It is safe to assume that Doctor Nisbet's personality left a

[3] *Bulletin of the New York Public Library*, I (1897), 118.

lasting influence on Taney's life. Taney was at Dickinson during a formative period in his life, from the time he was fifteen years old until he was eighteen. Certainly in his public career he later revealed traits much like those of Doctor Nisbet. He had strong convictions and he sometimes expressed them with more force than tact. He was a Roman Catholic with the stubborn integrity and idealism of a Scotch Presbyterian.

Taney graduated from college in 1795 as valedictorian of his class. The valedictorian at that time was elected by the class, so the honor was as much a tribute to his popularity as to his scholarship. After spending a winter at home he went to Annapolis, Maryland, in the spring of 1796, to begin the study of law.

He read law in the office of Jeremiah Townley Chase, one of the judges of the General Court of Maryland. Judge Chase had been a member of the Maryland convention which ratified the federal Constitution in 1788. He had been one of eleven members, out of the seventy-four present, who voted against ratification on the ground that the Constitution lessened the power, and seemed to threaten the sovereignty, of the States. The minority had fought hard for adding a bill of rights to the Constitution.[4] One cannot assume from this that Judge Chase remained a radical States' rights man all his life,[5] but his appreciation of the dignity of the States and his advocacy of a bill of rights reveal something of his political philosophy which must not be forgotten when one is considering the influence that he would exert on a young law student reading under his direction.

At that time Annapolis was the best place in Maryland to study law. During the sessions of the General Court,

[4] J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, II, 547-56. J. T. Scharf, *History of Maryland*, II, 543, 547.

[5] Samuel Chase was also one of the minority of eleven. His later intemperate devotion to the Federalist cause is well known.

Taney heard and saw some of the greatest lawyers of America. Luther Martin, Philip Barton Key, John Thompson Mason, and Arthur Shaaf were among those who impressed him most. As he listened to these men he was stirred by ambition, and the hope that some day he might occupy a position at the bar as enviable as they held. Toward this end he worked diligently at his studies, reading as much as twelve hours a day for weeks at a time.

Federalist Leader In Maryland

He was admitted to the bar in 1799 and, mainly because of the request of his father, returned to his home county of Calvert to begin the practice of law. With his father's encouragement he became a candidate for the State legislature, and was elected. His work in the legislature won for him a position of respect in his own county and in the State. He confidently expected to be reëlected, but the Federalist party, of which he was a member by birth and environment took the unpopular side of a question as to how presidential electors should be chosen and he was defeated.

After this untimely interruption of his political career, Taney decided to leave Calvert County and go to some place where the opportunities for advancement in law practice were greater. After giving the matter careful consideration he decided to locate in Frederick, which next to Annapolis and Baltimore was the best place in the State to build up a profitable practice at that time.

In 1803, he was one of the candidates nominated for the House of Delegates by the Federalists. The county was predominantly Republican but he and John Hanson Thomas, one of his fellow candidates, conducted a vigorous speaking campaign.[6] One of their early appearances was at a Republican barbecue, which they attended at the invitation of one of

[6] Members of the House of Delegates were elected from Multi-member districts.

the Republican leaders.[7] When the most militant Republican manager of the barbecue heard of the invitation he said that these two Federalists should be "thrown into John Swearingen's mill-dam" if they came.[8] Taney and his partner went to the barbecue in the hope that they could do a little missionary work. When the Jeffersonian who had wanted to throw them into the mill-dam saw them coming he left in high indignation with the explanation that "there were so many d—d Federalists there." Finally, as a result of the commotion which their coming had caused, the two Federalist missionaries went back to town with some of their friends and ate dinner at a tavern. In the evening they had a chance to make speeches, although according to the Federalist *Frederick-Town Herald*, the Republicans made a violent clamor until they wore themselves out.[9]

Other barbecues and more clamoring followed. Charges and counter charges were hurled back and forth. The *Republican Advocate* called Taney an aristocrat. "Precious representatives, indeed, would the people have in such men as Roger B. Taney and his little man Sancho," they said.[10] At the end of this campaign of barbecues and invective the Federalists were defeated. Taney settled down once more to the practice of law.

In 1807, a wave of indignation swept over the United States as a result of the "Chesapeake Affair." On the Fourth of July a public meeting was held in Frederick, and a committee was appointed to draw up resolutions expressing the feeling of the people. Taney was one of the members of the committee. The committee drew up a set of resolutions condemning the attack of the British warship on the Chesapeake.

[7] *Frederick-Town Herald*, September 17, 1803.

[8] *Ibid.*, October 1, 1803.

[9] *Ibid.*, September 17, 1803.

[10] Quoted in E. S. Delaplaine, "Chief Justice Roger B. Taney—His Career at the Frederick Bar," *Maryland Historical Magazine*, XIII (1918), 124.

One of the resolutions was, "That we pledge to the government, our lives and fortunes to support them in obtaining redress for this unexampled insult to our national honor, and that we will at all times prefer prompt and decisive war to dishonorable peace." The resolutions were unanimously adopted by the meeting.[11]

Taney, in company with most of the Federalists, opposed American entrance into war with Great Britain in 1812, but as soon as war was declared he supported the government. The Federalist party in Frederick County was split into two groups on the war issue. Those who followed Taney in supporting the government were called "Coodies," and he was called "King Coody." It was during the war that Taney's brother-in-law, Francis Scott Key, wrote "The Star Spangled Banner." Tyler calls "The Star Spangled Banner" "the song of Maryland Federalism."[12] But it was really the song of only part of the Federalists, for the two factions were in wide disagreement on the war issue, and feeling was sometimes very bitter between them.

In 1816, Taney was elected to the Maryland Senate. By that time the anti-war Federalists had forgiven him and approved of his selection. One of his first official acts was to introduce a series of resolutions condemning the congressional caucuses which nominated candidates for president.[13] During his five years as State senator he took a creditable part in the business of the senate. His vote on some questions is interesting, and perhaps revealing. In 1818, he voted against a bill to tax "all banks or branches thereof in the state of Maryland, not chartered by the legislature."[14] This act, aimed at the branch of the Bank of the United States, was passed, and its attempted enforcement led to the famous case

[11] *Frederick-Town Herald,* July 11, 1807.

[12] Tyler, *op. cit.,* p. 108.

[13] *Votes and Proceedings of the Senate of Maryland,* January 2, 1817, p. 19.

[14] *Ibid.,* February 11, 1818, p. 40.

of *McCulloch v. Maryland*.[15] In 1820, Taney was one of four out of fourteen senators who voted in favor of a bill "to prohibit the pernicious practice of cock-fighting and gaming within this state."[16] In the next session he voted against the repeal of the law prohibiting the importation of slaves into Maryland.[17] He was again in the minority. Taney's standing as a lawyer was recognized by his appointment to numerous committees dealing with legal matters and many of the statutes concerning courts of law, of equity, and the orphans' courts, which were passed during this period, were drawn up by him.[18]

In 1823, Taney moved to Baltimore. Not long afterward he became attorney for the Union Bank of Maryland, and also one of its directors.[19] It is possible that his later hostility to the Bank of the United States was partly a result of his connection with this state bank. The president of the Union Bank, Thomas Ellicott, was a man of extraordinary intelligence and vigor. He and Taney were often in consultation. Ellicott's views on the Bank of the United States were known to be similar to those later expressed by Taney when he took a prominent part in the war on the Bank.[20] In 1826, Taney was counsel for Solomon Etting, senior director of the Union Bank, in a suit against the Bank of the United States. The chicanery of the officials of the Bank of the United States in the incidents surrounding this case may also have left a lasting impression on him.[21]

By the time he moved to Baltimore Taney had become recognized as one of Maryland's greatest lawyers. William

[15] 4 Wheaton, 316.

[16] *Votes and Proceedings of the Senate of Maryland*, February 2, 1820, pp. 49, 50.

[17] *Ibid.*, January 10, 1821, p. 19.

[18] Tyler, *op. cit.*, p. 120.

[19] B. C. Steiner, *Life of Roger Brooke Taney*, p. 83.

[20] J. E. Semmes, *John H. B. Latrobe and His Times*, pp. 399-400.

[21] Steiner, *op. cit.*, pp. 92, 93.

Pinkney had died; Luther Martin was a wreck. It was an opportune time for Taney to take the leadership of the bar. In 1825, he was admitted to practice before the Supreme Court of the United States. From then on he appeared as counsel in cases before the Supreme Court at not infrequent intervals, often associated with other leading lawyers of the time. In 1826, Justice Story, writing to a friend, referred to him as "a man of fine talents."[22] In 1827, Taney's standing as a lawyer in his own State was recognized when a governor of the opposite political party appointed him attorney general upon the unanimous recommendation of the Baltimore bar.

As A Leader of Jacksonian Democracy

About the time he moved from Frederick to Baltimore Taney changed his politics. The Federalist party had been in its death throes for a good many years. The bitter opposition of its leaders to the War of 1812 sealed its doom. Taney, and many other Maryland Federalists, had had little patience with the conduct of the bitter-enders. When the party expired, some of its erstwhile members became National Republicans and later Whigs, while others joined the ranks of those who followed Andrew Jackson. Taney was in the latter group. In 1825, when the election of a president was thrown into the House of Representatives, John Quincy Adams records in his diary that Representative Warfield reported that he had been urged by Charles Carroll of Carrollton and Mr. Taney of Baltimore to vote for Jackson. Carroll and Taney had argued that if Adams was elected his administration "would be conducted on the principle of proscribing the federal party."[23]

Federalists had been attracted to the support of Jackson in the campaign of 1824 by the publication of some of his

[22] W. W. Story, *Life and Letters of Joseph Story*, I, 493.

[23] February 7, 1825, *Memoirs of John Quincy Adams*, edited by C. F. Adams, VI, 499.

correspondence with Monroe in 1816.[24] Jackson had then been trying to get Monroe to appoint a former Federalist, Colonel William H. Drayton, Secretary of War. Before the war Colonel Drayton had been a Federalist, but as soon as war was declared he had sprung to the defense of his country. "Such a man as this," wrote Jackson, "it matters not what he is called will always act like a true American."[25] Jackson also advised the President to avoid party and party feeling in selecting his cabinet members. "Now is the time to exterminate the *monster* called party spirit," he said.[26] A few months later he wrote again, and after strongly condemning the Hartford Convention brand of Federalists, said, "But I am of opinion that there are men called Federalists that are honest, virtuous, and really attached to our government, and, although they differ in many respects and opinions with the Republicans, still they will risk everything in its defense."[27] Such sentiments could not fail to appeal to Federalists, now left without a party and not knowing which way to turn. Some, among them Taney, were drawn to support Jackson. Some of these later found Jacksonian company and Jacksonian policies uncongenial and became Whigs.[28] Taney however, finding himself in harmony with the fundamental principles of Jacksonian Democracy, remained a Democrat.

In 1831, after the disrupting influence of the grim Calhoun and the beautiful Peggy O'Neil had broken up Jackson's first cabinet, Taney was appointed Attorney General of the United States. As Attorney General he became one of Jackson's most trusted advisers, his influence being of most significance in connection with Jackson's policy toward the Bank of the United States. Later, as Secretary of the Treasury he was closer to the President than any other member of

[24] J. Parton, *Life of Andrew Jackson*, II, p. 356.
[25] *Ibid.*, p. 358.
[26] *Ibid.*, pp. 360-61.
[27] *Ibid.*, p. 367.
[28] Charles Carroll was one of these.

his cabinet. Perhaps the reason was, as one writer puts it, he was "the most like Jackson in the vigor of his blows."[29]

A hostile Senate rejected Taney's appointment as Secretary of the Treasury, but Jackson never forgot what he had done. In 1836, when Justice Duvall resigned his seat on the Supreme Court, Taney was immediately nominated to take his place. The Senate was still controlled by men who had come to hate him in the struggle over the rechartering of the Bank. Chief Justice Marshall, although he bitterly disliked Jackson, had a high regard for Taney's legal talents, and privately endeavored to get his appointment confirmed.[30] The Senate, however, refused to confirm the appointment.

Chief Justice of the Supreme Court

Less than a year later Chief Justice Marshall died and Jackson nominated Taney to succeed him. The political complexion of the Senate had changed since Taney's previous rejection, and this time his appointment was confirmed, although his enemies still strenuously opposed him. Upon being informed of the Senate's confirmation of his appointment, Taney wrote Jackson a letter of appreciation, in which he said:

I feel that the first letter I write after the receipt of this intelligence should be addressed to you, to express the deep sense I shall ever retain of the constant kindness with which you have supported me, until you have finally placed me in the high station which I now fill, and which is the only one under the Government that I ever wished to attain. There are indeed circumstances connected with my appointment, which render it even more gratifying than it would have been in ordinary times. In the first place I owe this honor to you to whom I had rather owe it than to any other man in the world, and I esteem it higher because it is a token of your confidence in me. In the second place I have been con-

[29] Claude Bowers, *The Party Battles of the Jackson Period*, p. 140.

[30] Tyler, *op. cit.*, p. 240.

firmed by the strength of my own friends, and go into the office not by the leave, but in spite of the opposition of the men who have so long and so perseveringly sought to destroy me, and I am glad to feel that I do not owe my confirmation to any forbearance on their part. . . . And it is a still further gratification, to see, that if providence spares our lives, it will be the lot of one of the rejected of the panic Senate, as the highest judicial officer of the country to administer in your presence and in the view of the whole nation, the oath of office to another rejected of the same Senate, when he enters into the first office in the world, and to which it is now obvious that an enlightened and virtuous people are determined to elect him. The Spectacle will be a lesson; which neither the people nor politicians should ever forget.[31]

Henry Clay had been one of the leaders in the Senate against the confirmation of Taney. After he had observed Taney's work as Chief Justice he changed his opinion of him and sought an interview in order that he might tell Taney of his change of heart. According to Reverdy Johnson he said to him,

Mr. Chief Justice, you know that in my place in the Senate, before your nomination to the office which you now fill was submitted to that body, as well as during its considerations, I said many harsh things of you. . . . But I now know you better. I have carefully and anxiously watched your course on the bench, and have sometime since become satisfied that I had done you injustice. I am now convinced that a better appointment could not have been made, and that the ermine, so long worn and honored by Marshall, has fallen on a successor . . . every way his equal, and I have sought this interview so to say to you.[32]

Taney came to the Supreme Court at a time when there seemed to be a need for a liberalization of the law. Marshall had been well suited for the task of welding a federation of

[31] *Correspondence of Andrew Jackson*, edited by J. S. Bassett, V, 390.

[32] Reverdy Johnson, at a general meeting of the bar of Baltimore, October 14, 1864. *Proceedings of the Bench and Bar of Baltimore*, p. 18.

thirteen suspicious states into a strong national union. Taney succeeded him when the nation was in the midst of a democratic revolution in politics, and a revolution in industry of far reaching importance. In his zeal to strengthen the Union, Marshall had sometimes given scant consideration to the power and position of the States. The industrial revolution made necessary new laws regulating industry for the benefit of the whole people, and the democratizing of political institutions put the common people in a position where they could effectively demand laws protecting their interests. The decisions of the State courts began to show a liberal trend in the twenties. It was with the accession of Taney and other appointees of Jackson and Van Buren to the Supreme Court that it too developed a liberal trend in keeping with the spirit and need of the time.

Taney's appointment, coming when it did, was a particularly fortunate one for the development of American law. He was a great technical lawyer with a better legal training than any of his predecessors.[33] And happily he combined with his knowledge of the law a democratic philosophy and human sympathy which gave promise that his decisions would be made with a view to economic and social conditions, and not entirely from a coldly legalistic point of view. His association with President Jackson and his conspicuous part in the struggle with the Bank had demonstrated, and perhaps strengthened, his sympathy for the common people and his mistrust of powerful corporations. His democratic political views are revealed in a letter which he wrote to Jackson in 1838, part of which is here quoted:

In large commercial cities, the money power is, I fear irresistible. It is not by open corruption that it always, or even most gen-

[33] F. R. Jones, "Roger Brooke Taney," *The Green Bag*, XIV (1902), 2; H. L. Carson, *The History of the Supreme Court of the United States*, I, 291; E. Countryman, *The Supreme Court of the United States*, p. 51.

erally operates. But when men, who have families to support who depend for bread on their exertions, are aware that on the one side they will be employed and enriched by those who have the power to distribute wealth, and that, if they take the other, they must struggle with many difficulties that can be thrown in their way, they are very apt to persuade themselves that that path is the best one in which they meet fewest difficulties and most favour, and surrender the lasting blessings of freedom and manly independence for temporary pecuniary advantages. They forget the grinding oppression that awaits them from the power they are contributing to establish, as soon as it is firmly seated in the saddle and no longer needs their support. . . . But one thing is clear, that if the effort to render the laboring classes of this country servile and corrupt and to destroy their independent spirit and self-respect shall be successful, that class of society who are striving to produce it, will be the first and most terrible victims of their own policy. The lessons of history upon this point are too plain to mislead us.[34]

Taney was Chief Justice of the Supreme Court from 1836 until 1864. During that period he wrote something like three hundred opinions, only a very few of which were dissenting opinions. His decisions when he spoke for the Court, and his few dissenting opinions as well, have with few exceptions, been finally received as correct statements of the law.[35] Only one of his opinions, that in the Dred Scott case, has been looked upon with permanent hostility.[36] Among his most important decisions were the following: *Charles River Bridge v. Warren Bridge*,[37] in which he construed a corporation's charter strictly, in order that the interest of the public might be protected; License Cases,[38] in which he gave a liberal interpretation to the police power of the States;

[34] Quoted in Charles Warren, *The Supreme Court in United States History*, II, 36-37. By permission of Little, Brown & Company, publishers.

[35] G. W. Biddle, in *Constitutional History of the United States as Seen in the Development of American Law*, p. 125.

[36] *Ibid.*, p. 198.

[37] 11 Peters, 420.

[38] 5 Howard, 554.

Genesee Chief v. Fitzhugh,[39] which extended the admiralty power of the national government; the Dred Scott decision,[40] which denied the possibility of a Negro becoming a citizen of the United States, and declared that Congress had no power to abolish slavery in the Territories; *Ableman v. Booth*,[41] which strongly upheld the power of the national government and its courts and their right to be free from State interference; and *Ex parte Merryman*,[42] in which Taney held that the President has no power to suspend the writ of habeas corpus.

Of the principles laid down in these decisions more will be said in future chapters. It may be noticed in passing that the decisions in the Charles River Bridge Case, the License Cases, and *Ex parte Merryman*, are liberal decisions beneficial to human rights. The decisions in the Genesee Chief case and *Ableman v. Booth* strengthen the power of the national government. The Dred Scott decision, coming at a time when feeling on the subject of slavery was waxing very hot, increased the bitterness of the Abolitionists and pulled down on Taney's head maledictions from which his reputation has not yet recovered.

Opinions of the Critics

Justice Benjamin R. Curtis, one of Taney's associates on the Supreme Court, has left a vivid description of Taney as Chief Justice. Justice Curtis, it will be remembered, did not always agree with Taney; notable among his dissents was that in the Dred Scott case. In an address to the Boston Bar in October, 1864, Justice Curtis said of Taney:

In consultation with his brethren, he could, and habitually did, state the facts of a voluminous and complicated case, with every important detail of names and dates, with extraordinary accuracy,

[39] 12 Howard, 443.
[40] 19 Howard, 393.
[41] 21 Howard, 506.
[42] *Campbell's Reports*, 246-70.

and, I may add, with extraordinary clearness and skill. And his recollection of principles of law and of the decisions of the court over which he presided was as ready as his memory of facts. . . . His mind was thoroughly imbued with the rules of the common law and of equity law; and . . . when I first knew him he was master of all that peculiar jurisprudence which it is the special province of the courts of the United States to administer and apply. His skill in applying it was of the highest order. His power of subtle analysis exceeded that of any man I ever knew,—a power not without its dangers to a judge as well as to a lawyer; but in his case it was balanced and checked by excellent common sense and by great experience in practical business, both public and private. . . . For it is certainly true . . . that the surpassing ability of the Chief Justice, and all his great qualities of character and mind, were more fully and constantly exhibited in the consultation-room . . . than the public knew, or can ever justly appreciate. There, his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them, and always for the better.[43]

Taney's manner and bearing and the effectiveness of his language impressed all those who observed him in the courtroom. John H. B. Latrobe, who was a young lawyer in Baltimore when Taney lived there, later said of him that he "appealed to court or jury in language so simple, yet so clear, that those who listened almost fancied they could do as well themselves, so great was this grand lawyer's faculty of statement and argument."[44]

When Taney died, October 12, 1864, many Republican papers, their viewpoint colored by the passions of war, remembered the Dred Scott and Merryman decisions, and seized the occasion to comment on his career with rancorous

[43] *A Memoir of Benjamin Robbins Curtis*, II, 338-41.

[44] "Reminiscences of Baltimore," read before the Maryland Historical Society in 1880, *Maryland Historical Magazine*, I (1906), 118.

expressions that were as inappropriate as they were unjustified.[45] However, there were some strong Republican papers, not so blinded by emotion, that acknowledged his greatness.[46] The newsapers were not the only mediums of comment on the dead Chief Justice. The *Atlantic Monthly*[47] devoted an article to him, which after calling him a "judicial Calhoun" went on to say, "He denied the settled truths of science. He slandered the memory of the founders of the government and framers of the Declaration." One of his statements in the Dred Scott opinion was referred to as a monstrous "combination of ignorance, injustice, falsehood and impiety."

Someone else who modestly preferred to remain anonymous wrote a pamphlet called *The Unjust Judge*. In regard to Taney's decisions it said, "A long series of opinions, too trite even to be quoted and too dull to be read, which would not confer distinction upon a judge of the most inferior judicatory in the land, and the Dred Scott decision, which would disgrace any man or jurist in Christendom, are an all-sufficient justification of the minority of the Senate" (who voted against his confirmation).[48] Summing up its judgment of him it said, "As a Jurist, or, more properly speaking, as a Judge, in which character he will be most remembered, he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment."[49]

Time and the ultimate leaven of common sense work many changes in the opinions of men. When Chief Justice Hughes spoke at the unveiling of a monument to Chief Justice Taney in Frederick, Maryland in 1931[50] and referred to Taney's career as "one of the most distinguished careers in

[45] See Charles Warren, *op. cit.*, II, 389.
[46] *Ibid.*, p. 391.
[47] XV (1865), 151-61.
[48] *The Unjust Judge*, p. 7.
[49] *Ibid.*, p. 67.
[50] *The United States Daily*, September 28, 1931.

American annals" no one objected. There are few students of history and the law who would now disagree with him. The distinguished jurists of Taney's own age passed on him the same verdict that Hughes rendered in 1931.[51] Reverdy Johnson spoke with little exaggeration when he said, "And the calm judgment of posterity, uncorrupted or unaffected by partisan passion, will ratify the conclusion of the Bar of the Union that a purer and abler Judge never lived than Roger B. Taney."[52]

[51] Tyler, *op. cit.*, pp. 486-516.
[52] *Ibid.*, p. 498.

II

THE SOVEREIGNTY OF THE CORPORATE PEOPLE

Introduction

WE SHALL see as we develop Taney's political theory that, although he was predominantly English in his attitude toward the law, his conception of the limitless power of the state[1] as a corporate political body is at some points strikingly similar to that of Rousseau. This belief in the sovereign power of the state is perhaps the outstanding feature of this theory. It will be noticed in his attitude toward groups within the state; in his discussion of the status of individuals, whether aliens, citizens, or slaves; in his development of the police power; and in the limits that he sets to the power of government officials.

As a thorough-going Jacksonian democrat Taney believed also in individual liberty. It is not always an easy task to reconcile authority with freedom. Rousseau tried to do it, but his reasoning has failed to convince all of his readers.[2] However, it was becoming increasingly clear in Taney's time that in a complicated social world liberty under the law brings the largest amount of freedom to the greatest number of people.

Although it is not unreasonable to assume, because of his excellent educational background and intellectual interests, that Taney was acquainted with many of the classics of the literature of political science, it would be a mistake to place

[1] The term, state, is used here in its general sense and not as meaning a State of the United States. When used to designate a State of the United States the word will be capitalized throughout this study.

[2] See F. Pollock, *An Introduction to the History of the Science of Politics*, pp. 79-81; also W. A. Dunning, *A History of Political Theories from Rousseau to Spencer*, p. 19.

too much credit for his political theory on the books that he read. Men of affairs do not get their political or economic philosophy simply by reading books. While there may be found in Taney's theory resemblances to Rousseau and other philosophers, it is possible in most such instances to find an American background which goes far to explain his views on the point at issue. Consequently, we must conclude that his environment and the play of the social and economic forces of his time, probably had as much to do with the development of his fundamental ideas as did any of the books that he read.

Early American Political Theory

The political theory of the American Revolutionary period was essentially that of John Locke. Briefly, Locke held that men have certain natural rights, chief among which are those of life, liberty and property, that government results from a compact between the individuals who compose the state, and that the state cannot take away the natural rights of men. This was the doctrine predominant in America during the period of the Revolution. The parallel with Locke's ideas is especially noticeable in the Declaration of Independence,[3] but it may also be found in a number of the State constitutions of the period.[4] The acceptance of Locke's ideas at that time was quite natural, since the theory developed to justify the English Revolution of 1688 could be used as effectively to justify the American Revolution of 1775.

When the Constitution was framed some years after the close of the American Revolution, the radicals were no longer

[3] For a discussion of the connection between Locke's ideas and the Declaration of Independence see Carl Becker, *The Declaration of Independence*, Chap. 2.

[4] Notably in the New Hampshire Bill of Rights (1792); the Massachusetts Constitution, Pt. 1, article 1 (1780); the Maryland Declaration of Rights (1776). Perley Poore, *The Federal and State Constitutions*, pt. 2, p. 1294; pt. 1, pp. 957, 817-820.

in control of affairs, but the theories of the political contract and of natural rights were still widely accepted. Federalist judges who had been leaders during the period of the Revolution and doubtless influenced by the current thought of the time, used the doctrine of natural rights to protect the rights of private property. In 1798 Justice Samuel Chase said:

I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the state. . . . An act of the legislature contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. A law that punished a citizen . . . for an act, which, when done was in violation of no existing law; a law that destroys, or impairs the lawful private contracts of citizens . . . or a law that takes property from A and gives it to B. It is against all reason and justice for a people to intrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it.[5]

Chief Justice Marshall said in 1810:

It may be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.[6]

The Federalists, who had been horrified by the disregard for private property rights during the Confederation period,

[5] *Calder v. Bull,* 3 Dallas, 388 (1798). Compare with Locke, "Thirdly, the supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society which was the end for which they entered into it; too gross an absurdity for any man to own." *Of Civil Government,* Book 2, Sec. 138, p. 187.

[6] *Fletcher v. Peck,* 6 Cranch, 135 (1810). See also *Ogden v. Saunders,* 12 Wheaton, 346 (1827).

were anxious for the protection of these rights under the new government. With a slight shift in emphasis Locke could serve as their patron saint as well as that of the Jeffersonians, for he had said that "The great and chief end . . . of men uniting into commonwealths . . . is the preservation of their property; to which in the state of nature there are many things wanting."[7] To the Federalists property was "as sacred as the laws of God,"[8] and during the period when they controlled the Supreme Court it was used as an agency for limiting State action which seemed to threaten rights of private property.[9]

The Theory of Jacksonian Democracy

When Roger B. Taney was appointed to the Supreme Court in 1836 the country was in the midst of a democratic revolution which found national expression in Jacksonian Democracy. The suffrage had been widely extended by the States, and property qualifications for officeholding had been removed. As a result the laborers of the East were able to make their influence felt more forcefully in political affairs. In the West new States were being admitted, and the frontiersmen, who were both democratic and nationalistic, were exerting an important influence on national affairs.

In the meantime social and industrial developments were raising problems which the government could not ignore. Lines of transportation had been developed to meet the needs of the expanding country. National and State governments

[7] *Of Civil Government*, Book 2, Sec. 124, p. 180.

[8] *The Works of John Adams*, edited by C. F. Adams, VI, 9.

[9] E. S. Corwin says, "The leading doctrine of Constitutional Law during the first generation of our national history was the doctrine of *'vested rights'*, under warrant of which the courts treated any legislative enactment unduly infringing upon property rights without making compensation to the owners, as utterly beyond the purview of legislative power, even though not specifically inhibited by the letter of the written constitution." *National Supremacy*, p. 113. By permission of Henry Holt and Company, publishers.

were spending large sums on roads and canals. Railroads and steamboats were rapidly replacing stage coaches and flatboats. Transportation companies were seeking special privileges and profitable monopolies. New inventions were revolutionizing methods of production. Production in large corporation-owned factories where there was no direct contact between owners and workers led to many evils. The labor of women and children, long hours and low wages, bad living conditions—these were some of the evils which had appeared. Some of these difficulties were complicated and intensified by the increasing flow of immigrants. Out of it all was growing a strong labor movement, and since the workers had got the right to vote they began to make themselves felt politically. An increasing amount of social legislation by the States reflected the democratic trend in politics.

Under such conditions an individualistic philosophy of natural rights was no longer suitable. The government was being called on to regulate more and more the business and social affairs of men which it had previously left alone. Individualism no longer meant freedom. It seemed rather to provide an opportunity for the strong to oppress the weak. The common people had the vote and they moved away from such a philosophy toward one of increasing social control. In the sense that the conception of the state as rather strictly limited by natural law was giving way to a conception of a state with power to do anything for the social welfare, the political theorist may express the change that was taking place in the dominant political philosophy of the country by saying that Locke was giving way to Rousseau. The change began to be reflected in the State courts in the 1820's. It is noticeable in the decisions of the Supreme Court after Taney became Chief Justice. The Federalist controlled Court had limited the social legislation of the State governments, under

the guise of protecting the constitutional grants of power to the national government. Taney's Court allowed more freedom for social legislation.[10]

Jacksonian Democracy produced no great political theorists. Its leaders were men of action rather than of words. Among them Taney was one of the most influential and also perhaps the best prepared by training and intellectual background for the expression of the thought of the period. He was himself primarily a man of action rather than a theorist, but in his opinions as Chief Justice and in his previous political expressions may be found what is probably the best statement obtainable of the political theory of the new democracy. In his exposition of the law is clearly discernible the swing toward a strong state with power to legislate over the whole range of human interests where the social welfare seems at stake. He finds individual freedom best protected by the sovereign people who in their corporate capacity compose the state. When individual rights are threatened by the government their will, not the will of government officials, is the law.

Individual Rights are Not Natural Rights

Taney's opinion in the Dred Scott case[11] and the supplement[12] which he wrote to it show that he thought of the state as being formed by a social compact, but there is no evidence that he believed in natural rights, a belief which had accompanied the contract theory in the minds of earlier American and English political thinkers. Whenever he refers to individual rights they are rights established by law. In his

[10] This subject will be discussed in more detail in the chapters on the police power. See also E. S. Corwin, *op. cit.*, pp. 114-19.

[11] 19 Howard, 393 (1856).

[12] As a result of the criticism of his opinion in the Dred Scott case Taney wrote a lengthy supplement giving further proof in support of his opinion. It is published in Tyler, *op. cit.*, pp. 578-608.

supplement to the Dred Scott opinion, speaking of the American Revolution he said, "It was undertaken to maintain ancient and established rights which had been invaded by the British Government."[13] Although he was in the midst of a discussion of the Declaration of Independence he did not refer to those "ancient and established rights" as natural rights, rather he said, "The colonists claimed the rights of Englishmen, as secured by *magna carta* and the principles upon which the British Government was founded. They did nothing more."[14] Even in cases where he seemed to summon every resource of logic and evidence at his command, as he did in the Dred Scott case in defense of property rights and in the Merryman case[15] in defense of individual freedom, Taney did not in a single instance appeal to natural rights or the law of nature.

In no instance does Taney refer to a state of nature. His viewpoint is essentially that of a practical lawyer and statesman rather than of a theorist. The American States and the American nation, as he saw it, had been formed by compacts among the people who composed them, but they had not emerged fresh from a state of nature. They had back of them a long tradition of English political institutions. Taney was well grounded in the common law, and through this law America is connected with the evolutionary continuity of English political development which seems to have neither beginning nor end. As a lawyer and jurist he had no need for a state of nature in his theory.

The Social Compact and Popular Sovereignty

The Dred Scott opinion and its supplement and a few brief remarks in other opinions give clues to Taney's belief in the compact theory. There is not in any of his opinions anything

[13] *Ibid.*, p. 600.
[14] *Ibid.*
[15] *Ex parte Merryman*, Campbell's Reports, 254 (1861).

like a full discussion of his views on the subject. He places much more emphasis on the idea of popular sovereignty than he does on the compact theory, although he associates the two together so closely that it is almost impossible to discuss his conception of one without also discussing the other.

In contrasting the American political system with the English, Taney pictures the American system as one of popular sovereignty and the English system as one where sovereignty resides in the king, and he points out that the change in the location of sovereignty in America was brought about by the formation of a new political compact. In this connection he says:

> In England the sovereignty resides exclusively in the person or individual who is king. All Englishmen are his subjects. And the highest peer in the realm . . . has no share in the sovereignty. Their statutes profess to be passed by the King, by and with the advice and consent of the Parliament, treating the Parliament as advisers and not as the makers of the law. . . . All offences are charged in indictments to be committed "against his peace and dignity," and the crime of treason can be committed against the King only, and not against the Parliament or people of England.
>
> But, according to our institutions, the sovereignty does not reside in any one individual, but in the whole people, who form the political body called the State. Every one who is a member of this social compact is a citizen, and a component part of the sovereignty.[16]

[16] Supplement to the Dred Scott Opinion, Tyler, *op. cit.*, p. 605. This statement is similar to Thomas Paine's assertion, "Sovereignty, as a matter of right, appertains to the nation only, and not to any individual; and a nation has at all times an inherent indefeasible right to abolish any form of Government it finds inconvenient, and establish such as accords with its interest, disposition, and happiness. . . . Every citizen is a member of the Sovereignty, and, as such, can acknowledge no personal subjection; and his obedience can be only to the laws." *Rights of Man*, p. 66. It will be noticed however that Paine finds sovereignty in the people of the state "as a matter of right," and he is laying down a general rule, while Taney, speaking of the United States, declares that sovereignty resides in the people "according to our institutions."

Taney thought of the change which occurred as a result of the Revolution as being of fundamental importance. It was not comparable to a change in dynasty, for the political organization in America had undergone a radical change. New *states* had been formed. "Those who displaced the sovereignty of the English monarch, and associated themselves in a new political body, retaining the sovereignty in their own hands, had the power and the right to determine who should, and who should not, be admitted as members of this association, and share equally with themselves the sovereignty they had established in their own hands."[17]

Chief Justice Jay had announced a similar doctrine in his opinion in *Chisholm v. Georgia*[18] in 1793. Referring to the English system he said:

That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. . . . No such ideas obtain here; at the revolution the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects, unless the African slaves among us may be so called, and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint-tenants in the sovereignty.[19]

It is interesting to notice the stress which both Taney and Jay place on the change in the location of sovereignty brought about by the Revolution. They must have known that the idea of a sovereign king in England was only a legal fiction.

[17] Supplement to the Dred Scott Opinion, in Tyler, *op. cit.*, p. 606.

[18] 2 Dallas, 419.

[19] *Ibid.*, 471-72. Compare with Mr. Justice Baldwin in *Rhode Island v. Massachusetts*, 12 Peters, 720 (1838). "Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority . . . adopted the constitution. . . ."

Taney perhaps gives evidence of this realization when he says, "Their statutes profess to be passed by the King. . . ." The fact that he defined the location of sovereignty in England as a legal fiction might raise a question as to whether or not he thought of popular sovereignty in the United States as being also a legal fiction. His utterances in the struggle over the recharter of the Bank and on other occasions, which will be discussed in later chapters, give evidence that he believed in popular sovereignty as a vital reality, something much more than a fiction.

It is noticeable that Taney conceives of the States formed at the time of the Revolution as new political associations. He thought of the United States as being another political body created by the Constitution, and he applied the same principles to this national association that he applied to the States. He says, "The words, 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."[20]

Thus far we have considered Taney's theory of the nature of the political associations in the United States almost wholly as it is revealed in his opinion in the Dred Scott case and its supplement. He does not refer to the States of the Union as being formed by political compacts in any of his other opinions. He does, however, refer to the national Constitution as being a compact between the people of the several States. In *Ableman v. Booth*, after declaring that the Constitution was formed by a voluntary act of the people of the several States he asserts that it is the duty of a "sovereign

[20] *Dred Scott v. Sandford*, 19 Howard, 404 (1856).

state" to observe "the compact into which it voluntarily entered when it became a State of this Union."[21] In *Kentucky v. Dennison* he refers to the interstate rendition clause as a "compact engrafted in the Constitution."[22]

His expressions on popular sovereignty are clearer and more frequent. In his dissenting opinion in *Luther v. Borden* he said, "No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure."[23] In *Fleming et al. v. Page* he said, "For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives according to the delegation and distribution of powers contained in the Constitu-

[21] 21 Howard, 525 (1858).

[22] 24 Howard, 103 (1860). These statements show that Taney thought of the Federal Constitution as a compact between the States as political entities and binding on them as such. His assertion in *Kennett et al. v. Chambers,* 14 Howard, 50, that a citizen is "personally pledged" by a treaty of the government because it "is made by the department of government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made" carries the suggestion that the Constitution is binding on individual citizens because made by them.

These ideas are suggestive of St. George Tucker's theory that the Constitution was a compact between the States as political entities, and also between the individual citizens of the States. Discussing the Constitution he said, "Here then are all the features of an original compact, not only between the body politic of each state, but also between the people of those states in their highest sovereign capacity." And at another point he said of the Constitution, "It is a compact by which the several states and the people thereof, respectively, have bound themselves to each other, and to the federal government." *Blackstone's Commentaries,* Vol. 1, Appendix, note D, pp. 151, 169.

St. George Tucker, professor of law at the College of William and Mary, published an edition of Blackstone's *Commentaries* in 1803 which, in addition to the text of Blackstone, contained "the first legal commentaries on the Federal Constitution which appeared in the United States." It had a wide circulation. Charles Warren, *A History of the American Bar,* p. 336.

Taney's theory is similar to Tucker's at a number of points, but he does not agree with him in all particulars.

[23] 7 Howard, 47 (1848).

tion."[24] In another decision he pointed out that the status of a county was radically different from that of a State, and said of counties, "They form together one political body in which the sovereignty resides."[25]

From the discussion thus far it is evident that Taney thought of the state where popular government prevails as being the result of a compact between the citizens who compose it. In the United States the compact took the form of a constitution which defined the powers of government. In a later chapter dealing with the Merryman case we shall see that he thought of a valid expression of the sovereign will as being a constitutional expression. It was not simply the apparent will of the majority of the citizens that was sovereign, but the will of the corporate body as expressed according to the provisions of the constitutional compact.[26]

The Theoretical Background for Taney's Ideas

Taney's conception of the composition and power of the state seems to be essentially that of Rousseau. Rousseau thought of the state as being formed by a social compact in which "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."[27] Those who are associated in the body thus formed "take collectively the name of *people*, and severally are called *citizens*, as sharing in the sovereign power, and subjects, as being under the laws of the State." The Sovereign is "formed wholly of the individuals who compose it."[28]

Taney's American background probably had a great deal

[24] 9 Howard, 617-18 (1849).
[25] *Maryland v. Baltimore and Ohio R. Co.*, 3 Howard, 550 (1844).
[26] See Chap. 10.
[27] *The Social Contract*, Book 1, Chap. 6, p. 15.
[28] *Ibid.*, Book 1, Chap. 7, p. 17.

to do with the development of his ideas. In his own State of Maryland the Declaration of Rights which formed part of the constitution adopted in 1776 declared "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole."[29] His law teacher, Justice Jeremiah Townley Chase said in one of his decisions, "The bill of rights and form of government . . . is a compact made by the people of Maryland among themselves, through the agency of a convention selected and appointed for that purpose." And "This compact is founded on the principle that the people being the source of power, all government of right originates from them."[30] It is not unnatural that Taney should have expressed similar ideas.

Taney's conception of the two sovereign bodies in the United States, and the two compacts seems to have been very much like that of Monroe, who wrote in a veto message to Congress in 1822, "In the institution of the Government of the United States by the citizens of every State a compact was formed between the whole American people which has the same force, and partakes of all the qualities to the extent of its powers as a compact between the citizens of a State in the formation of their own constitution. It can not be altered except by those who formed it or in the mode prescribed by the parties to the compact itself."[31]

The Citizen is Subject As Well As Sovereign

In Taney's theory, along with the privileges which accompanied membership in a republic where the people were sovereign went also a peculiar responsibility of obedience to the laws, and acquiescence in the engagements made by the con-

[29] Perley Poore, *op. cit.*, pt. 1, p. 817.

[30] *Whittington v. Polk*, 1 Harris and Johnson, 242 (Md.-1802).

[31] J. D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, II, 147-48.

stituted authorities. He thought that free government could exist only when the citizens of the republic yielded ready obedience to the laws made and administered by their representatives.[32]

In foreign affairs, he pointed out, the citizen is bound to accept as obligatory the decisions of the government upon subjects involved in the nation's relations with other countries. It is a settled rule of international law that the citizen is at war with the nation which his government has declared war against and that he shall commit no act of hostility against a nation with which his government is at peace. Said Taney:

> It is, however more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made.[33]

Taney's views on this subject are perhaps comparable to those of Rousseau who refers to the people of the state as "*citizens*, as sharing in the sovereign power and *subjects*, as being under the laws of the State."[34] And there is striking similarity to Montesquieu's statement that "In a democracy the people are in some respects the sovereign, and in others the subject."[35] However, Taney emphasizes more the obliga-

[32] *Ableman v. Booth*, 21 Howard, 525 (1858).

[33] *Kennett et al. v. Chambers*, 14 Howard, 50 (1852).

[34] *The Social Contract*, Book 1, Chap. 6, p. 16.

[35] *The Spirit of the Laws*, Book 2, Chap. 2.

tion of the sovereign and the honor involved in his upholding the compact which he has made rather than the aspect of the citizen as subject. He did believe though that the citizen should be compelled to obey the law if he refused to do so voluntarily. He thought that "the safety of the community depends upon the vigilant and firm execution of the law; every one must be made to understand, and constantly to feel, that its supremacy will be steadily enforced by the constituted tribunals, and that liberty cannot exist under a feeble, relaxed or indolent administration of its power. . . ."[36] This is something like Rousseau's idea that the social compact tacitly includes the engagement "that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free. . . ."[37]

The Status of Individuals in the State

Taney held that the status of individuals living within the territory of a state depended upon the sovereign will as expressed in the form of law. In a case involving the power of a State of the Union he said, "Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States."[38] In the supplement to the Dred Scott opinion, referring to the status of Negroes in the United States, he said, "It is purely an American question, and depends entirely upon our own institutions, and upon the construction and meaning of the constitutions we have established."[39]

[36] Charge to the grand jury, United States Circuit Court, April Term 1836, Campbell's Reports, 616.

[37] *The Social Contract*, Book 1, Chap. 7, p. 18.

[38] *Strader et al. v. Graham*, 10 Howard, 94 (1850).

[39] Tyler, *op. cit.*, p. 606.

All persons residing in the territory of a state were not necessarily on the same basis. The citizens were the controlling group. To Taney the characteristic of citizenship is the fact that its possessor is a member of the social compact which forms the state, and is "a component part of the sovereignty."[40] Citizenship is acquired at the will of the corporate body. Referring to the States formed at the time of the American Revolution, in a statement which has already been quoted in another connection, he said, "Those who . . . associated themselves in a new political body . . . had the power and the right to determine who should, and who should not, be admitted as members of this association, and share equally with themselves the sovereignty they had established and retained in their own hands."[41]

It is noticeable that Taney conceives of the States formed at the time of the Revolution as new political associations which have the power either to admit new members or to keep them out. This idea is applied to the nation in the Dred Scott opinion proper. He thought of the United States as being a new political body created by the Constitution. Citizens were admitted to this body according to the provisions of the Constitution, and the Constitution had conferred on Congress the power to establish a uniform rule for naturalizing aliens. There was no other way by which citizenship could be acquired. Taney draws his conclusions in a paragraph distinguishing between the two political associations, the State and the nation, and the powers of the sovereign members of each.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the constitution, introduce a new member into the political community created by the constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for

[40] *Ibid.*, p. 605. [41] *Ibid.*, p. 606.

the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the constitution brought into existence, but were intended to be excluded from it.[42]

Continuing his discussion of citizenship in the United States, Taney says:

It is true, every person, and every class and description of persons, who were at the time of the adoption of the constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but no one else. . . . It was the union of those who were at that time members of distinct and separate communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States.[43]

Looking at the American situation Taney conceives of a State in the Union as an association of people, with certain sovereign powers, which had before the formation of the Union, and still has, the power to confer the privileges of State citizenship "upon an alien, or any one it thinks proper. . . ."[44] The nation is a larger association, composed originally of the people who were citizens of the States which entered the Union. This larger association has all the powers of sovereignty which were given to it by the people of the smaller associations, and it has the exclusive right to admit new citizens into it, in accordance with the provisions of the federal Constitution.[45]

Taney recognized the fact that a person may be a citizen without having a right to vote or hold office. This depended upon the laws. He says:

Undoubtedly, a person may be a citizen, that is a member of the community who form the sovereignty, although he exercises no

[42] *Dred Scott v. Sandford*, 19 Howard, 406 (1856).
[43] *Ibid.*, 406. [44] *Ibid.*, 405. [45] *Ibid.*

share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold office; yet they are citizens.[46]

Taney regarded the Negroes in the United States as occupying, by the will of the sovereign, an inferior position in American society. He declares that they were not meant by the makers of the Constitution to be included as citizens and he says, "On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."[47] And he goes on to say that it is not for the Supreme Court to say whether such a policy was either just or wise. "The decision of that question belonged to the political or lawmaking power; to those who formed the sovereignty and framed the constitution."[48]

Taney's views on slavery will be discussed more fully in a later chapter. It is not necessary to deal with them in detail at this point, but simply to call attention to the fact that he viewed the status of slaves as a matter to be determined altogether by laws in accordance with the constitution which expressed the will of the corporate sovereign.

Aliens constituted another group within the territory of the nation whose status Taney was several times forced to discuss. His views on this subject are in accordance with the settled principles of international law. He held that the sovereign could expel undesirable aliens or prevent them

[46] *Ibid.*, 422. [47] *Ibid.*, 404. [48] *Ibid.*, 404-5.

from entering.[49] As to property rights of aliens, he said in *Mager v. Grima et al.*, "Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state."[50]

In Taney's system whether the individual is a citizen, slave, or alien, his status and his rights depend upon the law which is an expression of the sovereign will. There is no natural right to citizenship, to freedom or to equality. There is no natural right to hold property. The corporate will of the sovereign is the final authority.

[49] *Holmes v. Jennison,* 14 Peters, 568-69 (1840); Dissenting opinion in *Passenger Cases,* 7 Howard, 466-67 (1849).

[50] 8 Howard, 493-94 (1849). See also *Prevost v. Greneaux,* 19 Howard, 1 (1856).

III

THE SOVEREIGN WILL

The Nature of Sovereignty

WE CANNOT presume to get an adequate conception of Taney's theory of the nature of sovereignty from any isolated expressions on the subject which may be found in his opinions. Rather, his theory must be distilled from a great many of his expressions and from the general lines of thought that run through all of his judicial decisions. However, some of his concise statements on the subject are particularly helpful because they are pointed indications of what his theory was.

The term "sovereignty" is a rather difficult one to deal with because it has been used to represent a wide variety of conceptions. Some of the earlier writers on the subject developed the idea of a powerful sovereign within the state but, thinking of the sovereign as an individual, or at most a comparatively small body of individuals, were not willing to give it quite the omnipotent power which they thought should reside somewhere within the state.[1] Others paid less attention to sovereignty and gave more thought to individual rights, apparently finding omnipotent sovereignty and individual liberty incompatible.[2] It remained for Rousseau to attempt the reconciliation of the two.

Rousseau thought of the state as "a moral person whose life is in the union of its members" which must have a compelling force "in order to move and dispose each part as may

[1] This is true of Hobbes and Bodin. See Thomas Hobbes, *Leviathan*, pt. 2, Chaps. 20, 21; also W. A. Dunning, *A History of Political Theories from Luther to Montesquieu*, pp. 96-103.

[2] This is especially evident in Locke. See *Of Civil Government*, Book 2, Chap. 11, pp. 184-85, 187. See also Montesquieu, *The Spirit of Laws*, Book 5, Chap. 7, pp. 34-36; Book 2, Chap. 6, pp. 112-20.

be most advantageous to the whole." And he said, "As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over all its members also; and it is this power which, under the direction of the general will, bears as I have said, the name of Sovereignty."[3] This seems to be essentially the theory of sovereignty that Taney held.

In his decision in the case of *Ohio Life Insurance and Trust Co. v. Debolt* Taney said, "It will be admitted on all hands, that with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories."[4] He called attention to the fact that this power might be used unwisely, saying:

> There are, undoubtedly, fixed and immutable principles of justice, sound policy, and public duty, which no State can disregard without serious injury to the community, and to the individual citizens who compose it. And contracts are sometimes incautiously made by States . . . and franchises, immunities, and exemptions from public burdens improvidently granted. But whether such contracts should be made or not, is exclusively for the consideration of the State. . . . For it can never be maintained in any tribunal in this country, that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than those fixed by the Constitution of the United States, upon the ground that they may make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest, is the foundation of our political institutions.[5]

[3] *The Social Contract,* Book 2, Chap. 4, pp. 26-27.

[4] 16 Howard, 428 (1853). Taney's conception of the sovereignty of the state is best revealed in his discussions of the powers of the States of the United States. The federal government was created for specific purposes and its power confined within relatively narrow boundaries by the Constitution. It is in the States that he finds the residue of sovereignty to which he sets no limits save those of the Constitution.

[5] *Ibid.,* 428-29.

Taney recognizes that principles of reason and justice will limit the exercise of the state's power, but the limitations will be imposed by the state itself and not by any power outside itself. Rousseau must have had a similar conception of the sovereign as being limited only by itself, for he said, "Each man alienates, I admit, by the social compact, only such part of his powers, goods and liberty as it is important for the community to control; but it must also be granted that the Sovereign is sole judge of what is important."[6]

Taney's Application of his Theory of Sovereignty

In spite of the unqualified way in which Taney speaks of sovereignty we cannot be sure of his actual conception of the power of the state without looking beyond his words to his judicial decisions. Bodin defined sovereignty as "supreme power over citizens and subjects, unrestrained by the laws," and then went on to say that there were certain laws which did restrain the sovereign.[7] Blackstone in his *Commentaries on the Laws of England* speaks of the sovereign power as being "a supreme irresistible, absolute, uncontrolled authority,"[8] and then a little later he devotes a chapter to the "absolute rights of individuals,"[9] defining the absolute rights of individuals as those which "would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."[10] Thus it is evident that men who talk about "supreme power" do not always do so without important reservations in mind.

[6] *The Social Contract,* Book 2, Chap. 4, p. 27.

[7] "Maiestas est summa in cives ac subditos legibusque soluta potestas. . . ." *De Republica,* Book 1, Chap. 8, p. 123. Bodin says the people can confer sovereignty on a ruler, but the ruler is limited by certain laws. See *ibid.,* pp. 134-37.

[8] *Commentaries on the Laws of England* (13th ed.) Introduction, Section 2, pp. 48-49.

[9] Chap. 1.

[10] Book 1, Chap. 1, p. 123.

The only instance in which Taney places any limitation, other than constitutional, on the power of the state is in an opinion where he declares that "a neutral power is not at liberty to decide according to her own convenience, whether she will perform her obligations or not; she is bound to perform them, and if she fails to do so, she becomes herself responsible for the injury which she ought to have prevented."[11] This would indicate that the state was bound by international law in its international relations. That his theory of the obligations of international law was not incompatible with his theory of sovereignty may be gathered from his decision in *Kentucky v. Dennison*,[12] a case involving two States of the American Union. In this decision he referred to the interstate rendition clause of the Constitution as a compact between the States which implied an "absolute right" on the part of one State and a "correlative obligation" on the part of the other,[13] but the obligation is finally defined as "the moral duty which this compact created."[14] He concludes that there is nothing which the Court can do to compel compliance with the compact. "The performance of this duty . . . is left to depend on the fidelity of the State executive to the compact entered into with the other States when it . . . became a member of the Union."[15] Applying this principle to international relations, it would seem that if a sovereign state refused to meet its obligations nothing could be done about it, unless there was a resort to war. The obligation of international law would seem to be a moral one. The sovereign could use its judgment about compliance.

Taney thought of the allocation of sovereignty as being beyond the province of the courts of law. In his dissenting opinion in the case of *Rhode Island v. Massachusetts* he said

[11] *Ardrey v. Karthaus*, Campbell's Reports, 383 (1836).
[12] 24 Howard, 66 (1860).
[13] *Ibid.*, 103.
[14] *Ibid.*, 107.
[15] *Ibid.*, 109.

"Sovereignty and jurisdiction are not matters of property; for the allegiance in the disputed territory cannot be a matter of property. Rhode Island, therefore, sues for political rights. . . . Contests for rights of sovereignty and jurisdiction between states over any particular territory, are not, in my judgment, the subjects of judicial cognisance and control, to be recovered and enforced in an ordinary suit; and are, therefore, not within the grant of judicial power contained in the constitution."[16] He said this in spite of the fact that the Constitution of the United States provides that "The judicial Power shall extend . . . to Controversies between two or more States. . . ."[17]

By saying that sovereignty is a political matter and not justiciable he evidently means that an expression of the sovereign will is necessary to subtract from the territorial limits of sovereignty. The courts cannot do it by a legal decision. Sovereignty is inherent in the people and can be limited only by themselves or by their political agents who may be given specific power to make agreements binding the state.

We have already discussed Taney's theory in regard to the power of the sovereign state to determine the status of individuals within its territorial limits. In future chapters we shall consider his views on the power of the sovereign as applied in the United States in connection with the police power and slavery and the fundamental rights of individuals. At this point we may throw some additional light on his theory of the sovereign power by considering his views on the taxing power, and on the obligations of the sovereign.

In one of his decisions, after declaring that the States of the Union are "absolutely and unconditionally sovereign" except as they are limited by the Constitution, Taney says, "It follows that they may impose what taxes they think proper upon persons or things within their dominion, and

[16] 12 Peters, 753 (1838). [17] Article 3, Sec. 2.

may apportion them according to their discretion and judgment. They may, if they deem it advisable to do so, exempt certain descriptions of property from taxation, and lay the burden of supporting the government elsewhere."[18]

In the case of *Mager v. Grima et al.*, involving an inheritance tax on property left to aliens, Taney said, "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it."[19] And, "We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."[20]

English speaking peoples have always regarded the taxing power as one of the powers of government which it was most important to keep under popular control. In the expressions just quoted Taney applies to it his theory of the supreme power of the state, setting no limits, except constitutional ones, to the power of the state to levy taxes. This statement in the inheritance tax case indicates that he believed that the state could do away with inheritances all together and itself take the property of deceased persons if it saw fit to do so.

It is a settled rule of public law that a sovereign state cannot be sued without its own consent. Taney applied and interpreted this rule in a number of his judicial decisions. In *Beers v. State of Arkansas* he said:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it

[18] *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 428 (1853).
[19] 8 Howard, 493 (1849).
[20] *Ibid.*, 494. See also *Prevost v. Greneaux*, 19 Howard, 7 (1856).

thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.[21]

In another opinion he said:

Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State; and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State. . . .[22]

Taney recognized a moral obligation on the state to see that justice was done. In a case involving a claim of the Bank of the United States, referring to a statute which the Bank claimed applied to the government as well as to individuals, Taney said:

If such be the construction of this law . . . it is the first instance in the history of nations in which a sovereignty has imposed a penalty upon itself, in order to compel it to be honest in its dealings with individuals. A sovereignty is always presumed to act upon principles of justice, and if, from mistake or oversight, it does injury to a nation or an individual, it is always supposed to be ready and willing to repair it.[23]

These opinions show that Taney thought of the sovereign as being above the laws which were made for individuals. But the sovereign was presumed to be willing to do justice without compulsion. Taney's conception of the obligation of justice which accompanies sovereignty has already been

[21] 20 Howard, 529 (1857).

[22] *Bank of Washington et al. v. State of Arkansas et al.*, 20 Howard, 532 (1857).

[23] *Bank of the United States v. The United States*, 2 Howard (Appendix), 759-60 (1844).

noticed in connection with the discussion of the sovereignty of the people.[24] He thought that because the citizen was sovereign he was bound to obey the law in a sense in which he would not be bound were he not a possessor of sovereignty.[25] The last statement quoted in the paragraph above implies that he thought of the state as a whole as being bound by the sense of honor which must accompany sovereignty.

The Government as the Agent of the Sovereign

Taney makes a sharp distinction between the sovereign and the government. He regards the government as being simply the agent of the sovereign and having only as much power as the sovereign has seen fit to bestow upon it. In the Dred Scott opinion, referring to the acquisition of territory by the United States, he said "it was acquired by the general government, as the representative and trustee of the people of the United States and it must therefore be held in that character for their common and equal benefit. . . ."[26]

In another opinion he discusses the power which may be conferred on the government, saying "It is equally clear . . . that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the powers and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest."[27] And he goes on to explain that "The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good. . . ."[28]

Taney's idea is similar to that expressed by Alexander

[24] In Chap. 2.
[25] *Kennett et al. v. Chambers,* 14 Howard, 50 (1852).
[26] *Dred Scott v. Sandford,* 19 Howard, 448 (1856).
[27] *Ohio Life Insurance and Trust Co. v. Debolt,* 16 Howard, 429 (1853).
[28] *Ibid.,* 431.

Hamilton when he wrote in *The Federalist* that the national and State governments of the United States were the "agents and trustees of the People."[29] In regard to American government Taney would agree with Rousseau's doctrine that governmental power existed subject to the will of the sovereign, as expressed in the statement, "This power it can limit, modify or recover at pleasure; for the alienation of such a right is incompatible with the nature of the social body, and contrary to the end of the association."[30] Taney's words are, "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure."[31]

There is perhaps a difference between Taney and Rousseau at this point in that Rousseau implies that there never could be established a commission of government which could not be modified or withdrawn by the sovereign at will, while Taney finds the right of the sovereign people to change the form of government at their will in "the institutions of this country." By this expression he probably meant the constitutions of this country. This is a distinction which may be observed at different points in Taney's theory. Whereas Rousseau speaks in general terms of broad powers and negatives, Taney enunciates principles of government with the constitutions of the United States in mind. He is a constitutional lawyer who finds in the Constitution the supreme law of the land.

Because he thinks of government as a trust which is to be exercised for the good of the people, Taney holds that one legislature cannot limit the power of its successors, unless it

[29] Number 45, *The Foederalist*, edited by H. B. Dawson, p. 325.

[30] *The Social Contract*, Book 3, Chap. 1, p. 50.

[31] *Luther v. Borden*, 7 Howard, 47 (1848).

has been given specific authority to do so by the constitution which created it. As a member of the Supreme Court he consistently applied this rule. In his decision in *Ohio Life Insurance and Trust Co. v. Debolt*, after saying that the powers of sovereignty confided to the legislature are a trust from the people he adds, "and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected."[32] On another occasion, in a case involving the powers of the government of the United States he said, "Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government. . . ."[33] That he did not believe that even the "necessary and proper" clause in the Constitution of the United States authorized such a surrender of power is indicated by the statement which he wrote into Jackson's Bank veto message,[34] "It can not be '*necessary*' or '*proper*' for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good."[35]

Since Taney's time, the doctrine that the government cannot divest itself of its important powers of legislating for the general welfare has been written into American constitutional law in the rule, now well established, that the State governments cannot barter away the police power.[36] In language

[32] 16 Howard, 431 (1853).

[33] *Brown v. Duchesne*, 19 Howard, 198 (1856).

[34] Taney says in his account of the Bank struggle, which is now in the Library of Congress in manuscript form, that he and Donelson wrote most of the veto message. See also *Correspondence of Andrew Jackson*, IV, 458, note.

[35] Bank veto message, July 10, 1832 Richardson, *op. cit.*, II, 583-84.

[36] Apparently the first definite move toward the establishment of this rule by the Supreme Court is the statement of Mr. Justice Field in the decision of *Boyd v.*

which reveals a conception of government essentially like Taney's, Chief Justice Waite said in the decision of *Stone v. Mississippi:*

No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . But the power of governing is a trust committed by the people to the government, no part of which can be granted away. . . . The contracts which the Constitution protects are those that relate to property rights, not governmental.[37]

How the Sovereign Will is Expressed

1. *The Constitution*—In a state where the people are the sovereign there may be some question as to how the sovereign will is expressed. Locke and Rousseau assume that at some time there was an original compact made by unanimous consent, and that after that a majority may be allowed to bind the whole.[38] Taney, dealing with a state which he knew had

Alabama, 94 U. S. 650 (1876): "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals." Although this statement was *obiter dictum* it was later cited in support of decisions where the Court definitely applied the rule. The rule was applied the following year in *Beer Company v. Massachusetts,* 97 U. S. 33 (1877).

[37] 101 U. S. 819-20 (1879). It should be noted perhaps that Taney never did say that *the people* did not have the power to bargain away the "public health or the public morals." He did however construe the police power very generously, as we shall see in the chapter dealing with that subject. In the *License Cases,* 5 Howard, 576-77, in connection with a discussion of the relation of the commerce power as limiting the police power of the States, he said, "But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them." He always construed the charters of corporations so strictly that he left the power of government to legislate for the general welfare unimpaired. See *Charles River Bridge v. Warren Bridge,* 11 Peters, 420 (1837); *Perrine v. Chesapeake and Delaware Canal Co.,* 9 Howard, 172 (1850); *Ohio Life Insurance and Trust Co. v. Debolt,* 16 Howard, 416 (1853).

[38] Locke says, "For, when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the

not been established by the unanimous consent of those who composed it, never says anything about a hypothetical compact of the past which authorizes a fraction of the people to bind the whole. Speaking of the Federal Constitution which, as we have already noticed, he regarded as the compact which created the sovereign body known as the United States, he said:

> The Constitution was, in the language of the Ordinance, "adopted by common consent," and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing states. It became the supreme law throughout the United States.[39]

In these statements he assumes that the sovereign power was organized and the sovereign will expressed by a compact which was "adopted by common consent," although it was not unanimous consent. He regards the Constitution as the supreme law, binding the people in the Territory of the United States as well as the people in the States, even though the people in the Territory had not been given an opportunity to vote for or against its ratification.

Taney regarded the will of the sovereign as a matter to be determined through the forms of law. In questions which concerned merely the constitution and laws of the States of the Union, which he regarded as sovereign bodies, he applied the rule that the Supreme Court would accept the interpretation of the State courts as authoritative.[40] This implies that the will of the sovereign is to be determined by its own law interpreting body.

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majority." *Of Civil Government*, Book 2, Chap. 8, pp. 164-65. Rousseau says, "The law of majority voting is itself something established by convention, and presupposes unanimity, on one occasion at least." *The Social Contract*, Book 1, Chap. 5, p. 14.

[39] *Strader et al. v. Graham*, 10 Howard, 96 (1850).

[40] *McBride v. Hoey*, 11 Peters, 172 (1837); *Holmes v. Jennison*, 14 Peters, 562 (1840); *Luther v. Borden*, 7 Howard, 40 (1848); *Nesmith et al. v. Sheldon et al.*, 7 Howard, 818 (1848).

In the case of *Luther v. Borden et al.*,[41] which arose as a result of the Dorr Rebellion in Rhode Island, the Supreme Court was asked to decide which of two governments in Rhode Island was the authoritative one. In his decision of the case Taney said, "Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature and placed the power in the hands of that department." And he goes on to say, "Under . . . the Constitution it rests with Congress to decide what government is the established one in a State. . . . And its decision is binding on every other department, and could not be questioned in a judicial tribunal."[42] It will be noticed that he does not look into the facts to see which government represented the will of the sovereign people. He leaves the matter of deciding which is the legitimate government to the political departments and accepts their judgment as final. This, he thinks is the method prescribed by the Constitution.

Taney again recognizes the principle that the sovereign will can be expressed only according to the provisions of the constitutional compact when he says in *Ableman v. Booth* that the people of all the States are solemnly pledged "to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes."[43] In his opinion in the case of John Merryman[44] he denied the right of the president to act outside his constitutional grant of powers, even though an emergency existed. Even though the existence of the state itself might be in danger the only expression of the sovereign will which he

[41] 7 Howard, 1 (1849).

[42] *Ibid.*, 42. See also *Kennett el al. v. Chambers*, 14 Howard, 50-51 (1852).

[43] 21 Howard, 525 (1858).

[44] *Ex parte Merryman*, Campbell's Reports, 254 (1861).

recognized as authentic was the constitutional expression. In this opinion he said:

> Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the constitution, in express terms, provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."[45]

In several of his decisions involving acts of legislation Taney reiterated the principle that the Constitution is the supreme law of the land and hence superior to the will of the legislature. In the *License Cases* he said, "The constitution of the United States declares that the constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States."[46] And in another decision he said, "And as the constitution is the fundamental and supreme law, if it appears that an act of congress is not pursuant to and within the limits of the power

[45] *Ibid.*, 260-61.

[46] 5 Howard, 573-74 (1846). Compare with John Marshall's statement in *Cohens v. The State of Virginia*, 6 Wheaton, 414 (1821): "America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. . . . The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void."

assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void."[47]

The idea that the Constitution represented the will of the sovereign people more directly than it did an act of the legislature and hence could not be repealed or modified by the legislature, but must be upheld by the courts, is a peculiarly American doctrine.[48] Madison expressed the idea in the constitutional convention, saying "A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."[49] The theory was expounded in the *Federalist*,[50] and later applied by Chief Justice Marshall in the celebrated case of *Marbury v. Madison*.[51] The underlying principle was, as Mr. Justice Paterson aptly put it, "The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the creature."[52] This was an essential part of Taney's theory. The will of the sovereign

[47] *Ableman v. Booth*, 21 Howard, 520 (1858).

[48] "The principle that statutory law, in order to be recognized as valid by the courts, must, in all cases, be in conformity with constitutional requirements, is a product of American law, and though now found in the jurisprudential systems of some other countries, has nowhere received the development and extended application that it has received in the United States." W. W. Willoughby, *The Constitutional Law of the United States*, 2d ed., I, 1. By permission of Baker, Voorhis & Co., publishers.

[49] July 23. Max Farrand, *The Records of the Federal Convention of 1787*, II, 93.

[50] No. 78 (Hamilton). At the beginning of his argument in favor of judicial review of legislation Hamilton says, "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No Legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; . . ." *The Foederalist*, p. 541. See also pp. 542-43.

[51] 1 Cranch, 137 (1803).

[52] *Vanhorne's Lessee v. Dorrance*, 2 Dallas, 308 (1795).

people was the supreme law. The acts of their agents were binding only when in harmony with that will as expressed in the Constitution.

2. *The Interpretation of the Constitution*—Believing as he did that the Constitution was the ultimate expression of the sovereign will, Taney held that it should be interpreted as it was written. Referring to "those who formed the sovereignty and framed the constitution" Taney said, "The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted."[53] As long as "there is no alteration or change in the Constitution," he held "It is still in full force according to its original meaning."[54] He thought that the courts could not be influenced by the acts of the legislature, when they were interpreting the Constitution. In a case involving an unconstitutional law he said, "The act of no future legislature can alter the meaning of the words used in the Constitution; they remain the same, and must always be construed and administered in courts of justice, according to their legal import, as they stand in that instrument, whether future legislatures do or do not obey its mandates, and pass laws to enforce its provisions."[55]

Taney's theory that the Constitution must be interpreted as written, regardless of changing conditions seems, and perhaps is, conservative. However, it follows naturally from his conception of the sovereignty of the people and the supremacy of the constitution which they have established. If the court is to act only as the agent of the sovereign it cannot modify the written expression of the sovereign will. The presump-

[53] *Dred Scott v. Sandford*, 19 Howard, 405 (1856).

[54] Supplement to the Dred Scott Opinion, in Tyler, *op. cit.*, p. 602.

[55] *Dill v. Elliott*, Campbell's Reports, 239-40 (1854).

tion is that the sovereign people would themselves change the Constitution if they wanted it changed.

In determining the meaning of the constitutional provisions, Taney thought that the interpretation of the men who wrote the Constitution was entitled to great respect. In one of his decisions he said:

> Independently, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of congress passed in 1789 a violation of the constitution. It was the first congress that met under the constitution, and in it were many men who had taken a prominent and leading part in framing and supporting that instrument, and who certainly well understood the meaning of the words they used.[56]

He believed too that the words of the Constitution should be carefully examined, and that "no word was unnecessarily used, or needlessly added." In the Constitution of the United States, he said "Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."[57]

Although Taney was careful to ascertain the meaning of the Constitution as written he did not construe it so strictly as to interfere with its effective operation as a framework of government. As Attorney General he expressed the opinion that "The constitution was formed for practical purposes, and a construction that defeats the very object of the grant of

[56] *Gittings v. Crawford,* Campbell's Reports, 7 (1838). John Marshall also attached great weight to contemporaneous exposition of the Constitution. In *Cohens v. Virginia,* 6 Wheaton, 418 (1821) he said "Great weight has always been attached and very rightly attached, to contemporaneous exposition. . . . The opinion of the Federalist has always been considered as of great authority. . . . Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."

[57] *Holmes v. Jennison,* 14 Peters, 571 (1840). For an application of this rule see *Dred Scott v. Sandford,* 19 Howard, 442 (1856).

power cannot be a true one."[58] And in one of his decisions he said, "The constitution looked to the essence and substance of things, and not to mere form."[59] That he did not construe the Constitution narrowly is perhaps best indicated by the facts that during his twenty-eight years as a member of the Supreme Court he held only one act of Congress unconstitutional,[60] and was noticeably generous in upholding the power of the State legislatures to enact measures for the general welfare.[61]

3. *The Interpretation of the Law*—Taney regarded as binding, the laws which were passed by "the representatives of the sovereignty . . . within the scope of their delegated authority."[62] Blackstone, regarding the King, Lords, and Commons as sovereign in England, defines municipal law as "a rule of civil conduct prescribed *by the supreme power in a state*."[63] Taney, regarding the people as sovereign in the United States holds the legislative acts of their agents to be binding so long as they act within the authority given them by the sovereign.

Speaking for the Supreme Court he said, "It is our duty to expound and execute the law as we find it. . . ."[64] The justice or injustice of a law was not a matter for the courts to look into. They must accept the will of the political branches of the government as final on that score.[65] The courts must

[58] To the President, July 19, 1832, *Official Opinions of the Attorneys General*, II (1825-1835), 527.

[59] *Holmes v. Jennison*, 14 Peters, 573 (1840).

[60] The Missouri Compromise in *Dred Scott v. Sandford*, 19 Howard, 393 (1856).

[61] See Chap. 7.

[62] *Kennett et al. v. Chambers*, 14 Howard, 50 (1852).

[63] *Commentaries on the Laws of England*, 13th ed., Introduction, Sec. 2, p. 46.

[64] *The United States v. Rogers*, 4 Howard, 572 (1854).

[65] "It would be useless at this day to inquire whether the principle thus adopted is just or not or to speak of the manner in which the power claimed was in many instances exercised . . . were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political department of the government, and not for the judicial." *Ibid.*, 572.

also accept the judgment of the legislature as to the need for legislation. In one of his opinions he said, "If, therefore, there be an evil, it may easily be corrected by the legislative authority of the general government. But if Congress have not thought proper . . . to exercise this power, and public mischief has arisen . . . it does not follow that the judicial power of the United States may step in and supply what the legislative authority has omitted to perform."[66] He thus places the responsibility for lawmaking squarely upon those who have been intrusted with that function by the Constitution.

In applying the law, Taney held that the courts should look to the intention of the lawmakers. In one of his decisions, after explaining that it was a settled rule of the Court to construe penal statutes rather strictly, he said, "Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction."[67] On another occasion he said:

> It is, undoubtedly, the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.[68]

These principles of construction were well established in English law. Blackstone said in his *Commentaries*, "The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the

[66] *Pennsylvania v. Wheeling Bridge Co. et al.*, 13 Howard, 581 (1851). Dissenting opinion.

[67] *United States v. Morris*, 14 Peters, 464 (1840).

[68] *Brewer v. Blougher*, 14 Peters, 198 (1840). Compare with Blackstone, "As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them." *Commentaries on the Laws of England*, 13th ed., Introduction, Sec. 2, p. 61.

law was made, by *signs* the most natural and probable."[69] Taney followed this rule in interpreting both statutes and constitutional provisions.[70]

Taney was keenly alive to the importance of the courts in interpreting the law, but he never forgot that it was the will of the sovereign and not the will of the courts that was law. Consequently, although he regarded constitutional acts of Congress as the supreme law, he cut through the technicalities of the common law or broke with judicial precedents when they seemed to interfere with the administration of justice. The difference between his attitude toward acts of Congress and toward the judicial forms of the law is indicated by the statement in one of his decisions, "But this court does not feel itself authorized to treat the directions of an act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law."[71]

His was the conception which Charles Warren expressed when he said, "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."[72] In 1832 he wrote into Jackson's Bank Veto message the statement that "Mere precedent is a dangerous source of authority. . . ."[73] In 1848 in his dissent in the *Passenger Cases* he said, after referring to a previous decision of the Court,

> After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the constitution, ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court,

[69] Sec. 2, p. 59.

[70] His Dred Scott opinion, 19 Howard, 393, is an excellent example of the application of this rule to constitutional interpretation.

[71] *United States v. Curry et al.*, 6 Howard, 113 (1847).

[72] *The Supreme Court in United States History*, II, 749.

[73] Richardson, *op. cit.*, II, 581.

that its opinion upon the construction of the constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[74]

Taney's most important break with the rule of *stare decisis* was in the case of *Genesee Chief v. Fitzhugh*.[75] Previous to that time the courts of the United States had interpreted admiralty jurisdiction as extending only over tide water, in accordance with the rule of English common law. In this decision Taney extended admiralty jurisdiction in the United States to the inland navigable waters beyond the ebb and flow of the tide. In so doing he overruled two previous decisions of the Supreme Court[76] and a doctrine previously regarded as settled.[77] His decision applied the law in accordance with the obvious needs of American conditions.

The liberalizing influence of the Genesee Chief decision has not been confined to its influence on admiralty law. It has been cited on numerous occasions and under a variety of circumstances when judges have been impelled to break with precedent in order to accomplish what seemed to them to be the real purposes of the Constitution. In 1895 Chief Justice Fuller, in a decision of the Supreme Court declared, after quoting Taney's words in the Genesee Chief case, that the duty of the Court to maintain the fundamental law of the Constitution "requires it not to extend any decision upon a

[74] 7 Howard, 470 (1848). Mr. Justice Brandeis accepts this as the correct rule for judicial interpretation in his dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 412-13 (1931).

[75] 12 Howard, 443 (1851).

[76] *The Thomas Jefferson*, 10 Wheaton, 428 (1825) and *The Steamboat Orleans v. Phoebus*, 11 Peters, 175 (1837).

[77] Mr. Justice Brandeis arguing against the application of the rule of *stare decisis* in his dissenting opinion in *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 238, 239 (1924) said, "The existing admiralty jurisdiction rests, in large part, upon like action of the Court in *The Genesee Chief*, . . . In that case . . . a doctrine declared by Mr. Justice Story with the concurrence of Chief Justice Marshall, and approved by Chancellor Kent, was abandoned when found to be erroneous, although it had been acted on for twenty-six years."

constitutional question if it is convinced that error in principle might supervene."[78] This is a principle which is essential to constitutional government.

It should not be inferred from what has been said that Taney was lacking in regard for the fundamental principles of the common law. On the contrary he held them in great respect. He regarded the common law as part of American law when adopted by the national or State governments.[79] As such it was subject to change by the legislature.[80] As a jurist he followed the rules of the common law for the construction of statutes except, as in the Genesee Chief case, when there was something about the American situation which made them inapplicable.[81]

[78] *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 576 (1894). Other decisions in which the Genesee Chief decision has been quoted in regard to the rule of *stare decisis* are: *Brickhouse et al. v. Hill*, 167 Ark., 520; 268 S. W. 867 (1925); *State v. Lewis*, 69 Ohio State, 208-9; 69 N. E. 134 (1903); *Prall v. Burckhartt*, 299 Ill., 40; 132 N. E. 288 (1921); *State v. Savidge*, 144 Wash., 310; 258 Pac. 4 (1927).

[79] On one occasion he said, referring to the jurisdiction of the Supreme Court, "But we cannot derive it from the common law. For it has been settled, since the beginning of this government, that the courts of the United States as such, have no common-law jurisdiction, civil or criminal, unless conferred upon them by act of Congress. It is true that the courts of the United States, when sitting in a State, administer the common law, where it has been adopted by the State. But it is administered as the law of the State, under the authority and direction of the act of Congress, which makes the laws of the State the rule of decision in a court of the United States, when sitting in the State, provided such laws are not contrary to the Constitution, laws, or treaties, of the United States." *Pennsylvania v. Wheeling Bridge Co.*, 13 Howard, 580 (1851). Dissenting opinion.

[80] "But in many of the states and territories, the ancient common-law remedy for the purpose of obtaining an allotment of dower, as well as the remedies for other mere legal rights, have been changed for others more convenient and suitable to our situation and habits. Yet they are regarded as cases at law, although they are not carried on according to the forms of the common law." *Parish v. Ellis*, 16 Peters, 453 (1842).

[81] In the Charles River Bridge decision, after quoting from an English decision, he said, "Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned?" *Charles River Bridge v. Warren Bridge*, 11 Peters, 545 (1837).

The respect in which Taney held the essential principles of the common law is revealed in a letter which he wrote to a friend in 1854 in regard to proposed law reforms in Maryland. In the letter he said:

I am sensible, indeed, that there are many more forms and technicalities in common law proceedings which the Courts ought to have reformed long ago. The power has been given to them by the Legislature to give judgment according to the right of the matter, without regard to matters of form; and yet they have *obstinately* (I must say) continued to treat as a matter of substance what evidently was nothing but form, merely because it was called substance in some of the old law books. I fear they will continue to do so, without some specific direction from the Legislature. But when that direction is given, it will require the greatest care and consideration to preserve all that is really essential to the common law and trial by jury, and dispense with everything else. . . . But to do this by legislation, and yet preserve in full vigor and usefulness the great principles of the common law and trial by jury (without which, in my judgment, no free government can long exist), will require much reflection and care in matters of detail, and great perspicuity in language.[82]

Regarding substance as much more important than form, he was yet aware that the common law, as Coke had put it, "hath been fined and refined by an infinite number of grave and learned men."[83] This attitude and its influence on his decisions gives Taney continuity with the past. His willingness to change rules of interpretation which no longer served the ends of justice, and his acknowledgment that the law in America rested on its adoption by the representatives of the sovereign people and could be changed by them, leaves the way open for progress and gives him continuity with the future.

[82] Tyler, *op. cit.*, p. 323.

[83] J. H. Thomas, *Systematic Arrangement of Lord Coke's First Institute of the Laws of England*, I, 1.

Conclusion

In concluding this chapter on Taney's conception of the sovereign will, it may be wise to state concisely certain basic features of his theory. So far as we may learn from his expressions he regarded the sovereign as absolute except for self-imposed limitations. Realizing that the sovereign people in the United States cannot speak with the same loquacity and directness on every occasion as might the sovereign king of a petty principality, he goes to the Constitution for the supreme law, and regards it as the only direct expression of the sovereign will. The government is the delegated agent of the sovereign in the everyday affairs of the state and its acts are to be regarded as the acts of the sovereign as long as they are constitutional. The laws of Congress are binding because they are made so by the Constitution, but only when they harmonize with its provisions. The Supreme Court as the interpreter of the sovereign will must find its authority in the Constitution as written, and not in their own precedents or the forms of the common law.

IV

THE SOVEREIGN POWER MUST NOT BE LIMITED BY GROUPS WITHIN THE STATE

The Democratic Movement in America

TANEY BELIEVED whole-heartedly in the sovereignty of the citizens who compose the state and regarded it as a matter of the utmost importance that the control of the government should not slip from their hands. In the United States of his time men no longer feared the establishment of monarchical institutions. The danger to popular sovereignty seemed to lie in political control by a privileged economic class. Years before, Rousseau had declared that when an association within the state becomes "so great as to prevail over all the rest . . . there is no longer a general will, and the opinion which prevails is purely particular."[1] In other words the acts of the state are made to serve the interests of the dominant class. As a political leader Taney was alert to prevent the development of any such power which would threaten the control of the whole American people over their government.

The democratic movement has made itself felt in resurgent waves in American history. Jeffersonian democracy, the Jacksonian revolution, and the liberalism of the early twentieth century were based on principles of government which were fundamentally alike. In a sense they were recurrent phases of the same movement. As one of the champions of popular control of the government in action, Taney's views are similar to those of the other democratic leaders in the line which extends from Jefferson to Bryan and La

[1] *The Social Contract*, Book 2, Chap. 3, pp. 25-26.

Follette and Wilson. In this phase of his political thought he is particularly American in his viewpoint.[2]

In each phase of the democratic movement the leaders of democracy have fought against the political dominance of a powerful economic class. The struggle was dramatized in the Jackson administration in the contest over the attempted recharter of the Bank of the United States and the discontinuance of government deposits in it. As one of the influential leaders in Jacksonian democracy Taney played an important part in this contest[3] and was one of the President's most aggressive advisers.

From the first cabinet meeting in which the Bank was discussed after he became Attorney General[4] until he left the cabinet Taney exerted his influence against the recharter of the Bank. Neither the friends nor the enemies of the Bank were long in doubt as to his position.[5] When Congress

[2] This is not meant to imply that there have not been similar contests in other countries. It is simply that Taney's ideas and their background are typically American. He is one of the leaders of the democratic movement, largely agrarian, which from the time of Jefferson to our own time has opposed the dominance of big business interests.

[3] "Taney was Jackson's chief reliance for arguments justifying the removal of the deposits, and his opinions on that subject are important." *Correspondence of Andrew Jackson,* V, 33 note.

[4] Taney left an interesting discussion of the Bank struggle which is now in the Library of Congress in manuscript form. In it he says that the first meeting of the new cabinet in which the Bank was discussed was held just before Jackson sent his annual message to Congress in December, 1831. When the message was read to the cabinet Taney objected to the equivocal manner in which Jackson handled the subject of the Bank. He says, "It was my first conflict in the cabinet. I stood alone in it; and in opposition to Mr. Livingston & Mr. McLane who were experienced politicians, & in both of whom I knew that the President at that time reposed the highest confidence." He failed to win Jackson to his viewpoint, and he says, "I left the Cabinet meeting when it had broken up . . . with strange doubts also whether under the influence of his new advisers he would not be persuaded to consent to the recharter of the bank. . . . " Manuscript, pp. 73, 87.

[5] C. C. Cambreleng, Jackson's leader in the House of Representatives wrote in January 1832 that Taney was with the most ardent Democratic leaders in the Bank struggle. J. S. Bassett, *The Life of Andrew Jackson,* p. 612. For reports of Taney's opposition to the Bank by the lobbyist of the Bank see R. C. McGrane, *The Correspondence of Nicholas Biddle,* pp. 150, 183.

heeded the request of the Bank and provided for its recharter Taney urged that the bill be vetoed.[6] Later he urged the discontinuance of government deposits in the Bank, although its old charter had a few more years yet to run.[7] The reason for his relentless hostility to the Bank is to be found in his belief that the issue involved was one of fundamental importance to the nature of the American political system. The controversy, as he saw it, was between a group of wealthy owners of corporate stock and the masses of the people, and the control of the government was at stake.

Oligarchy against Democracy

That Taney regarded the Bank struggle as part of what William Jennings Bryan called the "world-wide, never-ending contest between the beneficiaries of privilege and the unorganized masses"[8] is evidenced most clearly in a speech which he made after his retirement from the cabinet. In that speech he said:

> In every period of the world, and in every nation, history is full of examples of combinations among a *few* individuals, to grasp all power in their own hands, and wrest it from the hands of the many. The invaluable blessing of self-government has never yet been obtained by any nation, without a severe struggle and many sacrifices—and when the blessing has once been obtained, constant vigilance has been necessary to preserve it.[9]

Popular sovereignty, in this view, is not a God-given theoretical inheritance of mankind, but a prize which is won by struggle and maintained by vigilance. Taney may have had in mind the achievement of English liberty when he expressed this conviction, for it is a natural view for one well versed in the development of English legal institutions.

[6] Taney was in Annapolis at the time. He wrote the President a long letter advising the veto. Steiner, *op. cit.*, p. 107.

[7] *Correspondence of Andrew Jackson*, V, 33-41. Tyler, *op. cit.*, pp. 195-98.

[8] W. J. Bryan, *A Tale of Two Conventions*, p. 27.

[9] *Daily Albany Argus*, August 29, 1834.

It seemed to Taney that the American people in the struggle with the Bank were facing for the first time an issue which had long confronted the older nations of the world. "It is—shall the power of the government be exclusively in the hands of the great money holders, or shall it continue where the constitution has placed it, in the hands of a free and enlightened people. These opposing principles have long agitated the countries of Europe, and now we are doomed to meet here the struggle between them."[10] He sees in the struggle an issue vastly more important than a conflict between political parties. It is a struggle for sovereignty between an economic class on one hand and the whole people on the other. He says, "Now for the first time the issue is made up, and the question boldly and distinctly presented to us, whether this noble country is to be governed by the power of money in the hands of the few, or by the free and unbought suffrages of a majority of the people. It is a new question. It has nothing to do with the ancient or modern divisions of parties."[11]

Taney was not the only one of the Jackson leaders who saw the issue of popular sovereignty involved in the contest

[10] *Ibid.*

[11] *Ibid.*

Confronted by still larger combinations of wealth Robert M. LaFollette said in 1912, "The great issue before the American people to-day is the control of their own government. In the midst of political struggle, it is not easy to see the historical relations of the present Progressive movement. But it represents a conflict as old as the history of man—the fight to maintain human liberty, the right of all the people.

"A mighty power has been builded up in this country in recent years, so strong . . . that men are gravely inquiring whether its iron grip on government and business can ever be broken. . . . It rules in the organization of legislative bodies, state and national, and of the committees which frame legislation. Its influence is felt in cabinets and in the policies of administrations, and is clearly seen in the appointment of prosecuting officers and the selection of judges upon the Bench.

"And this THING has grown up in a country where, under the Constitution and the law, the citizen is sovereign!" Speech at the Banquet of the Periodical Publishers' Association, February 2, 1912. *LaFollette's Autobiography*, pp. 763-64. Quoted by permission of the Progressive Publishing Co.

with the Bank, although he seems to have stressed it more than his associates did. But Thomas Hart Benton objected to the recharter because he thought the Bank would "draw to itself too much of the political power of this Union. . . ."[12] *The Globe*, newspaper organ of the Jackson administration, said editorially, "We doubt exceedingly whether the agricultural people of the United States, will consent to the re-establishment of this institution, which overshadows with its influence the authorities which spring from their own suffrages."[13] Thus, there seems to have been a general feeling among the Jacksonians that an institution such as the Bank was incompatible with democracy.

To Taney the control of the state by a money power was especially distasteful. It was, in his opinion, the worst kind of government. Speaking to his friends and neighbors at Frederick he said:

> It was obvious to my mind . . . that a great moneyed corporation, possessing a fearful power for good or for evil, had entered into the field of political warfare, and was deliberately preparing its plans to obtain, by means of its money, an irresistible political influence in the affairs of the nation, so as to enable it to control the measures of the Government. It was evident, if this ambitious corporation should succeed in its designs, that the liberties of the country would soon be destroyed, that the power of self-government would be wrested from the people, and they would find themselves, at no distant day, under the dominion of the worst of all possible governments—a moneyed aristocracy.[14]

Taney was opposed to participation in politics by "a great monied corporation" even though its own interests were involved. It was his conviction that "The right of such an

[12] *Speech of Mr. Benton of Missouri against the Renewal of the Charter of the Bank of the United States* in the Senate February 2, 1831, p. 6 (printed by Duff Green, 1831).

[13] September 21, 1831.

[14] Tyler, *op. cit.*, pp. 227-28.

institution to interfere in the political concerns of the country, for any cause whatever, can never be recognized. . . ."[15] He was thinking of the conflict over sovereignty in terms of the forces actually at work in the United States. The one great corporation of the time, whose wealth overshadowed that of any other single economic combination, was using its power in politics to secure from the government a continuation of the privileges which gave it the financial dominance of American life. In an age when the privilege of voting was being rapidly extended among the common people he thought that if the Bank were allowed to exert itself continually in politics it would make American democracy merely an empty form.

The Weapons of a Wealthy Class

On several occasions Taney discussed the means which a money power could use, and which the Bank was using, to gain control of the government. As he describes the power of the weapons which lie at hand for the use of such a power, one cannot help believing that the cause of popular sovereignty must have seemed almost hopeless to him had he not had a vast amount of confidence in "the intelligence and patriotism of the people."[16]

One of the most effective instruments for influencing popular opinion in a large country is the control of the press. Taney pointed to the Bank's influence over the press as one of its dangerous weapons, and said, "The attempt of a great monied institution like the Bank of the U. States to exercise an influence over the press of the country by the mere power

[15] Report on the Removal of Deposits, December 4, 1833, *Public Documents and Proceedings of the Twenty Third Congress*, p. 23.

[16] "But I sincerely believe that the purity of our institutions and the best interests of the country call for prompt, firm and decisive measures on the part of the Executive, and I rely for support on the intelligence and patriotism of the people." Taney to Jackson, March, 1833, *Correspondence of Andrew Jackson*, V, 41.

of money, is pregnant with so much evil that it cannot be too severely and pointedly reprobated."[17] He saw in such a course of action a serious threat to the purity of democratic institutions.

Taney asserted that the Bank was using its money, through control of the press and the issuance of pamphlets, to destroy the political standing of the leaders who prevented its gaining control of the government.[18] It seemed to him that the Bank's methods of warfare were typical of those used by moneyed classes generally when they sought control of the government. They would go to any length to destroy their enemies, the champions of popular sovereignty. After alluding to the Bank's "unwearied perseverance" in its attempts to destroy him "in the estimation of the citizens of the United States" he declared, "No man who has at any period of the world stood forth to maintain the liberties of the people against a moneyed aristocracy grasping at power has ever met with a different fate. Its unrelenting, unquenchable hate has never failed to pursue him to the last hour of his life, and when in his grave."[19]

Taney was aware that political leaders were not the only

[17] *Ibid.*, p. 39.

[18] Report on the Removal of Deposits, December 4, 1833, *Public Documents and Proceedings of the Twenty Third Congress*, p. 23. The Bank's expenditure for "printing not connected with the daily operations of the Bank" from 1829 to 1834, inclusive, was $65,268.91. To this should be added the expenditures of the president of the Bank, who was authorized to spend money for propaganda purposes on his own orders and for which no vouchers were required. Under this authority between March 11, 1831 and September 30, 1834, $27,155 was spent, in addition to the sum mentioned above. The Bank's expenditures for printing were much larger in the election years of 1832 and 1834, which led a Senate committee of 1834 that had investigated the Bank to say, "The augmented amount of expenditure in the years 1832 and 1834 . . . taken in connexion with the circumstance, that during those two years important elections were to take place, subjects it to the charge, whether well or ill founded the Senate will determine, of a direct interference in elections from which it should most cautiously have abstained even in appearance." Senate Doc. 17, 23d Cong. 2d Sess., (Dec. 18, 1834) pp. 44-47.

[19] Tyler, *op. cit.*, p. 229.

ones made to feel the weight of the displeasure of a wealthy class which sought to control the government. Wealth brings power which may be used by those who possess it to force the common people into economic submission. Of the Bank he said:

> And it brings forward its demands in the spirit and temper, which in all ages, has marked the moneyed aristocracy, when they believed themselves strong enough to govern. It never appeals to the high and generous feelings of the people. It must govern by other means. If the poor laborer dare to think for himself, he is contemptuously dismissed from his employment, and, with his family, left to starve—the debtor is pressed for money he is unable to pay—the trader, with but moderate means, is denied the usual facilities necessary for the successful prosecution of his business.[20]

He knew that economic slavery was incompatible with political democracy. And in this instance he was pointing to weapons which may be used by economic overlords with great effect. Some years later in a letter to Jackson he expressed the fear that the money power was irresistible in large commercial cities.[21]

Taney pointed out the fact that a corporation, because of its nature, will tend to be more heartless in its actions than will an individual. Corporation sinning enables the perpetrators to escape without any acute consciousness of guilt. Referring to the Bank he said, "A corporation of the latter description is constantly acting under the conviction of its immense power . . . and is dealing also with the fortunes and comforts of men who are distant from them and to whom they are personally strangers. The Directors of the Bank are not compelled to hear daily the complaints and witness the sufferings of those who may be ruined by their proceedings. From the nature of man such an institution cannot

[20] *Daily Albany Argus*, August 29, 1834.

[21] Charles Warren, *The Supreme Court in United States History*, II, 36-37.

always be expected to sympathize with the wants and feelings of those who are affected by its policy."[22]

A Group Which Threatens Popular Sovereignty is a Public Enemy

Taney accused the Bank of bringing on a depression in order to punish the people for the action of the government in refusing to accede to its demands. In thus bringing suffering to the people, it seemed to him that the Bank was just as much an enemy of the United States as would have been a foreign power with which the nation was at war. In characterizing its action he said:

> It determined to rely on its power, and redress itself. And like a foreign enemy waging open war, it sought to alarm us into submission by ostentatiously displaying its power, first at one point and then another, and by the unsparing vengeance with which it brought ruin in every place where its power could reach. It endeavored, by spreading dismay thro'out the nation, to break the spirit of the people, and compel them to submit to its demands. It sought to obtain from their sufferings and their fear, what it did not hope would be yielded to their arguments and petitions. When the Bank determined to pursue this course, in what respect did its conduct and principle of action differ from that of an open and avowed public enemy?[23]

These statements show concisely and emphatically Taney's attitude toward the Bank. He sees it as a powerful group within the state—a group which refuses to accept the verdict of the government as final and attempts to force the people to repudiate the work of their agents. In attempting

[22] Report on the Removal of Deposits, December 4, 1833, *Public Documents and Proceedings of the Twenty Third Congress*, p. 25.

Seventy-five years later E. A. Ross was to write, "The modern high-power dealer of woe wears immaculate linen, carries a silk hat and a lighted cigar, sins with a calm soul, leagues and months from the evil he causes." And "There is nothing like distance to disinfect dividends." *Sin and Society*, pp. 10-11, 107.

[23] *Daily Albany Argus*, August 29, 1834.

this, it might as well declare war on the state, for it seeks through the suffering of the people to destroy their sovereignty.[24] It is the enemy of the state and to Taney the enemy within the state is just as dangerous as the enemy without the state.

The Government must serve only the Sovereign People

Taney discusses the importance of firm and independent action on the part of the government when a powerful class threatens the supremacy of the people. As Attorney General he wrote to Jackson, "For if the measures of the Government are to be influenced by the fear of its resentment or opposition, the time will soon come when its power must be encountered in some form or other, or the government be in effect surrendered into the hands of the Bank."[25] In his report to Congress on the discontinuance of government deposits in the Bank he called attention to the immense power of the Bank and then said:

But I have not supposed that the course of the Government ought to be regulated by the fear of the power of the Bank. If such

[24] The Bank used strenuous methods to accomplish its ends. From December 31, 1830 to May 1, 1832 it increased its loans from $42,402,304.24 to $70,428,070.72. This was a $28,000,000 increase in sixteen months, and at a time when the Bank's charter had only four more years to run. Report on the Removal of Deposits, December 4, 1833, *Public Documents and Proceedings of the Twenty Third Congress*, p. 22. The Bank applied for a recharter in January, 1832. Jackson vetoed the Congressional act providing for a recharter July 10, 1832. The Bank began to contract its business in August, 1833. From the first of August, 1833 to the first of April, 1834 the total contraction was $13,000,000 out of $62,000,000. From August 1833 to September, 1834 the Bank increased its specie on hand from $10,023,000 to $15,500,000. Most of this specie came from the collection of state bank balances, and forced the state banks to call in their paper. R. C. H. Catterall, *The Second Bank of the United States*, pp. 321-24. Catterall, who is on the whole favorable to the Bank says, "The enormous reductions made by the bank were certainly in excess of any possible danger, and were continued long after such danger threatened. The president and company of the Bank of the United States were . . . not merely angry, but vindictive, and vindictive with calculation. They hoped to force a re-charter or at least a restoration of the deposits by exercising a monetary pressure upon the country." *Ibid.*, p. 329.

[25] *Correspondence of Andrew Jackson*, V, 68.

a motive could be allowed to influence the legislation of Congress, or the action of the Executive Departments of the Government, there is an end to the sovereignty of the people, and the liberties of the country are at once surrendered at the feet of a monied corporation. . . . Will submission render such a corporation more forbearing in its course? What law may it not hereafter demand, that it will not, if it pleases, be able to enforce by the same means?[26]

This is a manifesto of independence for the government. He recognizes that the government must be submissive only to the sovereign. If the people cannot control it they are no longer sovereign. The government must defy any special interest within the state which seeks to dictate its actions. If it does not, then a "particular will" and not the "general will" will prevail.

Taney's place in Jeffersonian Democracy

In his attitude toward the Bank, and moneyed corporations in general, Taney belongs to the school of Jefferson and John Taylor. Jefferson and Taylor were agrarians who feared the growth of great business interests and the influence of a moneyed aristocracy in politics. Taylor asserted that "Enormous political power invariably accumulates enormous wealth and enormous wealth invariably accumulates enormous political power. Either constitutes a tyranny, because the acquisitions of both are losses of liberty and property to nations."[27] In 1803 Jefferson wrote of the Bank, "This institution is one of the most deadly hostility existing, against the principles & form of our Constitution." And after expressing a fear of the power that it might exercise in a time of crisis he added, "I deem no government safe which is under the vassalage of any self-constituted authorities, or any other

[26] *Public Documents and Proceedings of the Twenty Third Congress*, p. 25.
[27] John Taylor, *Tyranny Unmasked*, p. 253.

authority than that of the nation, or it's regular functionaries."[28] Later, in 1816, he wrote, "I hope we shall take warning . . . and crush in it's birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."[29] Taney was not Jeffersonian in all of his political philosophy, for he was not as thoroughly agrarian as Jefferson, but in his distrust of a money power and his jealous attitude toward the rights of the people when they conflict with chartered privileges of corporations he follows in the footsteps of the sage of Monticello.

The trust busters of the Theodore Roosevelt period belonged to this school of political thought. And Woodrow Wilson, a little later, declared that the government must control the banking system so as to prevent the concentration of the nation's monetary resources in a few hands,[30] that business must be freed from all forms of monopoly,[31] and that the government must not allow any other organization to become as strong as itself.[32] It is a school of thought that seeks to maintain political equality in a world of economic inequality, although it is aware that the two are hard to reconcile. It abhors oligarchy and seeks the preservation of actual democracy.

The Danger in Chartered Privileges

In the struggle with the Bank Taney revealed that he objected not only to its meddling in politics, but also to its monopolistic features. He saw in huge chartered monopolies a threat to the general welfare and to the power of the gov-

[28] To Gallatin, December 13, 1803, *The Writings of Thomas Jefferson*, VIII, 284-85.

[29] To George Logan, November 12, 1816, *ibid.*, X, 69.

[30] June 23, 1913, *The New Democracy*, I, 39-40.

[31] March 8, 1913, *ibid.*, p. 29.

[32] *Ibid.*, II, 307-8.

ernment as well. Here again he was following in the path of the Jeffersonians, for John Taylor had caustically declared, "A crocodile has been worshipped, and its priesthood have asserted, that morality required the people to suffer themselves to be eaten by the crocodile . . . ," and he added "Law charters are a family of those crocodiles."[33]

In Taney's report to Congress on the removal of deposits he said that aside from the Bank's objectionable conduct, "It cannot be supposed that the grant to this corporation of exclusive privileges at the expense of the rest of the community, for twenty years, can give it a right to still further enjoyment of its profitable monopoly." He declared further that he was convinced that the existence of "such a powerful monied monopoly" was dangerous to "the liberties of the people."[34]

In the constitutional arguments which Taney wrote into Jackson's veto message he voiced an opinion that Congress had no power to grant monopolies, except in the case of patents and copyrights where the power was specifically given by the Constitution. To grant a chartered monopoly, it seemed to him, was to limit the power of the government in a way that it could not constitutionally be limited. After referring to patents and copyrights he said, "On every other subject which comes within the scope of Congressional power there is an ever-living discretion in the use of proper means, which can not be restricted or abolished without an amendment of the Constitution."[35] It was his opinion that "It can not be '*necessary*' or '*proper*' for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good."[36] Assuming that Congress had the power to charter one bank, it had

[33] John Taylor, *An Inquiry into the Principles and Policy of the Government of the United States*, p. 69.

[34] *Public Documents and Proceedings of the Twenty Third Congress*, p. 16.

[35] Richardson, *op. cit.*, II, 584.

[36] *Ibid.*, pp. 583-84.

the power to charter more than one. If one were necessary, conditions might develop which would make another necessary. Congress had no constitutional power to bind itself for fifteen years not to charter other banks if they would serve the general welfare. So ran his argument.[37]

This attitude was reflected in a number of his judicial decisions. The Constitution specifically protected the obligation of contracts, and under John Marshall's leadership this provision had been strictly enforced. Taney recognized the force of the constitutional provision, but whenever the power of the government was at stake he construed a contract so strictly that the government's power would be left unimpaired, unless the wording of the contract was so plain that this could not be done. There were no chartered privileges by implication so far as his decisions were concerned.

In the Charles River Bridge decision,[38] involving a case where a State had chartered a toll bridge and later proposed to allow the building only a short distance away of a competing bridge, which would eventually become a free bridge, Taney said he thought there could be no serious difficulty in regard to the rule for the interpretation of the charter. "It is the grant of certain franchises by the public to a private corporation, and in a matter where the public is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals."[39] After quoting an English case which laid down the rule that ambiguities in a charter were to be strictly construed against the corporation and in favor of the public, he said he saw nothing in America's local situation to make it wise to depart from this rule. Then he added:

[37] *Ibid.*, pp. 583-84.

[38] *Charles River Bridge v. Warren Bridge*, 11 Peters, 420 (1837).

[39] *Ibid.*, 544.

We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly . . . and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.[40]

After referring to the public concern in the development of transportation in the rapidly growing American nation he said, "The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State unless it shall appear by plain words that it was intended to be done."[41]

This principle of the strict construction of corporation charters was reiterated in a later case where a canal company claimed the privilege of charging toll for the use of its canal. Referring to the argument of the corporation's lawyers that it could demand compensation for the use of its property like any other owner, Taney said, "The corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. It holds the property only for the purposes for which it was permitted to acquire it,—that is, to effectuate the objects for which the Legislature created it."[42] His attitude is plainly that the corporation is the servant of the public.

He also declined to allow the surrender of sovereign

[40] *Ibid.*, 545-46.

[41] *Ibid.*, 549-50.

[42] *Perrine v. Chesapeake and Delaware Canal Co.*, 9 Howard, 184 (1849).

power by implication in cases involving corporate exemption from taxation. In one such decision he said, "And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be misunderstood."[43] While admitting that the people might give their agents power to exempt corporations, by contract, "from their equal share of taxes" he was suspicious that such contracts would turn out to be injurious rather than beneficial to the public.[44] When corporations claimed tax exemption by chartered grants before his Court, they had to establish their rights beyond the shadow of a doubt.

The Maintenance of the General Will

Henry D. Lloyd in 1894 called attention to the fact that it is very easy for "those who want all the goods of government—charters, contracts, rulings, permits" to combine with place hunting politicians, and that from such a union is likely to come a formidable and unrestrained tyranny.[45] Taney was keenly aware of the possibility of such a tyranny. His prophylactic lay in the maintenance of actual popular sovereignty and for this end eternal vigilance on the part of the people was necessary. As an interpreter of the law he held that the officers of the government could not contract away any power which belonged to the sovereign without express constitutional authorization for such action. Where corporation charters were involved he was jealous to protect the power of the sovereign people. As a politician he did not

[43] *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 435 (1853). See also *Philadelphia etc. R. Co. v. Maryland*, 10 Howard, 392-93 (1850).

[44] *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 431 (1853).

[45] H. D. Lloyd, *Wealth Against Commonwealth*, pp. 519-20.

intend to see the people surrender any aspect of their sovereignty without being warned beforehand, and as an interpreter of the sovereign will he did not intend to allow the surrender of any portion of the sovereign power without a clear expression of the sovereign will.

V

THE NATURE OF THE UNION

Sovereignty in the United States

Because of the conflict of interests between North and South, the question of the nature of the federal Union and the location of sovereignty in the United States was warmly discussed throughout the period of Taney's public life. On the one hand were those who believed that the Constitution of the United States was a compact between the States which had established it as sovereigns and remained sovereign as parties to it. John C. Calhoun concisely expressed the theory of this group when he said, "According to my conception, the whole sovereignty is in the several States, while the exercise of sovereign powers is divided. . . ."[1] On the other hand were those who held with Mr. Justice Story that the Constitution was established by, "The people of the *United States,* not the distinct people of a *particular state* with the people of the other states," and that it was the irrevocable and supreme law of the nation.[2] The latter group, although inclined to stress the power of the nation, did not assign to it exclusive sovereignty. They held that sovereignty was divided between the States and the nation. Webster expressed their ideas in 1830 when he said, "The States are, unquestionably, sovereign, so far as their sovereignty is not affected by this supreme law. . . . The general government and the State governments derive their authority from the same source.

[1] Speech in the Senate in February 1833, *The Works of John C. Calhoun,* II, 233.

[2] Joseph Story, *Commentaries on the Constitution of the United States,* 5th ed., Vol. I, Sec. 352, pp. 252-53. Webster said of the Constitution, ". . . it pronounces that it is established by the people of the United States, in the aggregate." Remarks in the Senate January 27, 1830, *The Works of Daniel Webster,* III, 346.

. . . The national government possesses those powers which it can be shown the people have conferred on it, and no more."[3]

Chief Justice Taney, into whose background had gone Federalism, Jacksonianism, a Southern environment, and a thorough study of the law does not belong wholly in either group. Although he accepted the theory of divided sovereignty he believed that the nature of the powers reserved to the States and the safeguards for those powers embodied in the Constitution were such as to make it unnecessary for the States to fear that the national government would encroach upon their prerogatives. He was a constitutionalist. He looked upon the national and State governments as different parts of the political mechanism of our federal system which would function smoothly if the provisions of the Constitution were adhered to. In his judicial decisions he tried to maintain the division of power established in the Constitution in order that each might function in its proper sphere. In his scheme of things there was no necessity and no place for a serious conflict between State and national governments over power. Back of them both were the sovereign people who had established them and written the Constitution.

The Sovereign States before the Adoption of the Constitution

Taney's approach to the question of the relation between the States and the national government was by the historical method. As did his great contemporary, John C. Calhoun, he went back to the American Revolution and the events which followed it to determine the nature of the Union, but unlike Calhoun he held to the theory of divided sovereignty. During the first period of American history under the Constitution this theory had the weight of authority back of it, as we shall see in discussing the background of Taney's theory.

[3] Second Speech on Foote's Resolution, delivered in the Senate January 26, 1830 in *ibid.*, III, 321-22.

Taney held that "when the revolution took place, the people of each state became themselves sovereign. . . ."[4] The exigencies of the times brought them together under the Articles of Confederation, but even after they had entered this confederation for their mutual advantage and protection they were still "thirteen separate, sovereign, independent States." Their congress "was composed of representatives of these separate sovereignties, meeting together as equals, to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision." This body had none of the attributes of sovereignty. "It was little more than a congress of ambassadors, authorized to represent separate nations in matters in which they had a common concern."[5]

This view of the position of the States in the pre-Constitution period was neither a new view nor necessarily a States' rights view. Justice Samuel Chase had said in 1796 in *Ware v. Hylton*, referring to the Declaration of Independence, "I consider this a declaration, not that the United Colonies jointly, in a collective capacity, were independent States, &c., but that each of them was a sovereign and independent State, that is, each of them had a right to govern itself by its own

[4] *Martin v. Waddell*, 16 Peters, 410 (1842) St. George Tucker wrote in 1803, of the American colonies, "From the moment of the revolution they became severally independent and sovereign states, possessing all the rights, jurisdictions, and authority, that other sovereign states . . . possess; and bound by no ties but of their own creation, except . . . the customary law of nations." *Blackstone's Commentaries*, Vol. 1, Appendix, Note D, p. 150. On the other hand Mr. Justice Story maintained that the Declaration of Independence did not find the colonies sovereign or make them such, "but that at the moment of their separation they were under the domain of a superior controlling national government whose powers were vested in and exercised by the general Congress with the consent of the people of all the States." Joseph Story, *op. cit.*, Vol. I, Sec. 214.

[5] *Dred Scott v. Sandford*, 19 Howard, 434 (1856) During the period of the Confederation John Adams wrote in his *Defense of the Constitutions of Government of the United States of America* ". . . congress is not a legislative assembly, nor a representative assembly, but only a diplomatic assembly." *The Works of John Adams*, IV, 578.

authority and its own laws, without any control from any other power upon earth."[6] And John Marshall, discussing the political situation of the States before the adoption of the Constitution said, in *Gibbons v. Ogden*, "It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true."[7] Thus we see that Taney, in proceeding on the assumption that the States were individually sovereign before the formation of the Constitution, could appeal not only to the history of the period,[8] but to judicial interpretation of it worthy of the highest respect.

Divided Sovereignty Under the Constitution

In discussing the closer union formed under the Constitution, Taney held that it was formed "by the *people* of the United States, that is to say, by those who were members of the different political communities in the several States. . . ."[9] But the States kept their sovereignty.[10] Under the existing system, "with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within

[6] 3 Dallas, 224.

[7] 9 Wheaton, 187 (1824).

[8] Charles Warren in *The Supreme Court and the Sovereign States* gives some interesting evidence on State sovereignty in this period. "Thus, Connecticut, in its statute adopting a declaration of rights and privileges in 1776; declared itself a 'Republic' which 'shall forever be and remain a free, sovereign and independent State'. . . . In the treaty of peace, Great Britain acknowledged the United States, naming each State separately to be 'free, sovereign and independent States'. . . . The Pennsylvania Legislature recited in a statute of December 3, 1782, that 'whereas by the separation of the thirteen United States from Great Britain, the Commonwealth of Pennsylvania hath become a sovereign and independent State, and in consequence of such separation, a government established solely on the authority of the people hath been formed.'" pp. 3-4.

In 1784 when New York and Vermont were on the point of war with each other John Hancock, as Governor of Massachusetts, issued a proclamation of neutrality. Pp. 11-12.

[9] *Dred Scott v. Sandford*, 19 Howard, 410-11 (1856).

[10] *Kentucky v. Dennison*, 24 Howard, 102 (1860).

their respective territories."[11] Although Taney spoke thus in strong and broad terms of the reserved power of the States he was aware that important powers had been surrendered to the nation. On one occasion he referred to the "so large a portion of their former sovereign powers" which was surrendered by the States when the Constitution was adopted.[12]

He regarded the Union established by the Constitution as much more than another league of independent sovereignties. In it the people of the several States were for certain purposes one people.[13] The Constitution brought into being a new political community.[14] All persons who were citizens of the several States at the time the Constitution was adopted were members of the new political community, but after its adoption no State could admit new members. Only those who were born into it or were admitted into it by the national government could become citizens of the United States as a nation.[15]

Taney held that every person living within the boundaries of a State is subject to two governments, the State government and the national government. Both exercise powers of sovereignty. Neither is subject to the other. His conception of the relation between the two sovereignties is best expressed in his decision in the case of *Ableman v. Booth* where he said:

> And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State

[11] *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 428 (1853).
[12] *Dred Scott v. Sandford*, 19 Howard, 438 (1856).
[13] *Ibid.*, 435. [14] *Ibid.*, 406. [15] *Ibid.*

court, as if the line of division was traced by landmarks and monuments visible to the eye.[16]

This is the classic statement of the theory of the two sovereignties and it emphasizes their distinctness with unusual force. The idea of divided sovereignty, however, was an old one in Court decisions. In 1793 we find Mr. Justice Iredell saying in *Chisholm v. Georgia*, "The United States are sovereign as to all the powers of government actually surrendered: each State in the Union is sovereign as to all the powers reserved."[17] And in 1819 Chief Justice Marshall said in *McCulloch v. Maryland*, "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."[18]

The Supreme Court as Arbiter between the two Sovereignties

Taney saw the possibility of conflicts and disagreements in such a system of two sovereignties in one country. The courts of the States and of the national government would probably disagree as to the extent of the power granted to the national government. There was danger "that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal."[19] In order to provide against this danger the jurisdiction of the federal courts was extended to all cases arising under the Constitution and the laws of the United States. Their jurisdiction thus extended to unconstitutional as well as constitutional acts of Congress. The purpose of

[16] 21 Howard, 516 (1858).

[17] 2 Dallas, 435. See also Chief Justice Jay's opinion in the same case, p. 471.

[18] 4 Wheaton, 410.

[19] *Ableman v. Booth*, 21 Howard, 516 (1858).

this provision was not only to maintain intact the sphere of power granted to the federal government but also to protect the States from any encroachment of the national government on their reserved powers. As the Constitution was the supreme law of the land it was their duty to declare an act of Congress void if it was not within the limits of power assigned to the national government.[20]

Taney thought that the Supreme Court was singularly fitted to act as arbiter in cases involving disagreements over the division of powers between the two sovereignties. He said:

> It was not left to congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences of excited passions of the day. This tribunal, therefore, was erected and the powers of which we have spoken conferred upon it, not by the federal government, but by the people of the States, who formed and adopted that government, and conferred upon it all the powers . . . which it now possesses. . . . So long, therefore, as this constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.[21]

This is Taney's view of the Supreme Court as an impartial arbiter, acting as the agent of the sovereign people, maintaining the division of powers between two sovereignties existing in the same country.[22] Such an authority was logically neces-

[20] *Ibid.*, 520.

[21] *Ibid.*, 521.

[22] Contrast with the States' rights view as expressed by Abel P. Upshur. Speaking of cases before the federal courts he said, "If the decision should be against

sary to the believer in divided sovereignty. Taney's discussion of the Court in this capacity is similar to the opinion expressed by Madison when the Constitution was before the people for ratification. In the *Federalist* he wrote:

It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the General Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the General, rather than under the local Governments . . . is a position not likely to be combated.[23]

The Constitution as the Supreme Law

In Taney's system a State government and the national government are each supreme in its own sphere, and their powers are distinct, but the relation between the two is not the relation of separate nations to each other. "For all the great purposes for which the federal government was formed, we are one people, with one common country."[24] The Constitution is the supreme law for both State and federal government. "The Constitution of the United States is as much a part of the law of Pennsylvania as its own Constitution, and

the citizen, his only relief is by an appeal to his own State. He is under no obligation to submit to federal decisions at all, except so far only as his own State has commanded him to do so; and he has, therefore, a perfect right to ask his State whether her commands extend to the particular case or not. . . . His State may interpose in his favor or not, as she may think proper. If . . . she does, then it is no longer a judicial question. The question is then between new parties . . . between a sovereign State and its own agent; between a State and the United States. As between these parties the federal tribunals have no jurisdiction, there is no longer a common umpire to whom the controversy can be referred." *A Brief Enquiry into the True Nature and Character of Our Federal Government*, pp. 86-87 (1863). Originally published in 1840.

[23] Number 38, *The Foederalist*, p. 265.

[24] *Passenger Cases*, 7 Howard, 492 (1848). Dissenting opinion.

the laws passed by the General Government pursuant to the Constitution are as obligatory upon the courts of the States as upon those of the United States; and they are equally bound to respect and uphold the acts and process of the courts of the United States, when acting within the scope of its legitimate authority."[25] The sovereign people have simply divided the powers of government into two great sections and delegated them to their agents in the manner prescribed in the Constitution.[26] By this division certain powers were given to the federal government, and all others were reserved by the States.

Taney believed that the relation between the States and the national government should be one of coöperation. The States possessed powers which might be used to embarrass the national government but the good sense of the people would prevent the pursuit of such a policy. If the national and State governments should ever embark on a contest of "trying which shall do the other the most harm" it would mark the end of the Union. "The Union cannot be preserved by the mere strength and power of the federal government. It is dissolved as soon as it shall forfeit the affection and confidence of the states."[27]

In his decision in the case of *Ableman v. Booth*[28] Taney called attention to the fact that the Constitution was not forced on the States. Each State entered the Union by a purely voluntary act of its people. And he said, "Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sov-

[25] *Taylor et al. v. Carryl,* 20 Howard, 605 (1857). Dissenting opinion.

[26] *Fleming et al. v. Page,* 9 Howard, 617-18 (1849).

[27] From the argument of Taney and Reverdy Johnson, counsel for Maryland, in *Brown v. Maryland,* 12 Wheaton, 419 (1827).

[28] 21 Howard, 506 (1858).

ereignty is untarnished faith."[29] Then he added a statement of vital significance: "And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes."[30] If this was the correct theory of the Union there could be no nullification or secession by a State unless it broke faith with the other States with which it was joined in the Union. Every provision of the Constitution was binding on every State until changed by the regular method of constitutional amendment.

Taney did not belong to the States' Rights School

In looking for connections between Taney's conception of the nature of the Union and the theories of other political leaders who preceded him or were his contemporaries, one does not have to go far to discover that he did not belong to the States' rights school of Jefferson and John Taylor. Jefferson wrote in the Kentucky Resolutions that the Constitution of the United States was a compact and "as in all other cases a compact among powers having no common judge, each state has an equal right to judge for itself, as well as of infractions as of the mode and measure of redress."[31] And John Taylor in a discussion of the Union under the Constitution wrote, "But

[29] Compare with Vattel, *The Law of Nations*, p. 18, Sec. 10, "In short, several sovereign and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. . . . A person does not cease to be free and independent, when he is obliged to fulfil the engagements into which he has very willingly entered."

[30] 21 Howard, 525.

[31] *The Writings of Thomas Jefferson*, VII, 292. It should be remembered that Jefferson was not as radical in action as he was in theory. This is illustrated in a letter which he wrote to John Taylor after Taylor had hinted at the secession of Virginia and North Carolina. In his letter Jefferson said, "But if on a temporary superiority of one party, the other is to resort to a scission of the Union, no federal government can ever exist. . . . A little patience, and we shall see the reign of witches pass over . . . and the people recovering their true sight, restoring their government to its true principles." June 1, 1798, in *ibid.*, pp. 264-65.

the union possesses no innate sovereignty, like the states; it was not self-constituted; it is conventional, and of course subordinate to the sovereignties by which it was formed."[32]

Jeffersonian theory is thus seen to assign to the national government a position definitely subordinate to that of the States. One should not forget that Taney was a leader of the Federalists in Maryland in the period when the Republican party was Jefferson's, or that he broke with the New England leaders of his own party when they enunciated nullification doctrines and hinted at secession in the closing days of the War of 1812. In comparison with the Jeffersonians and the Hartford Federalists, Taney is a nationalist. He maintains the independence of the national government, the authority of the Supreme Court to interpret national laws, and the permanence of the constitutional Union.[33]

There is no place in Taney's scheme for nullification or secession. He considers the State and national constitutions as resting on the same basis, and the State and national governments as entitled to the same respect. Sovereignty rests in the people, who act in one capacity as members of the political body called the State and in another capacity as members of the larger political body, the United States.[34] The State and national governments operate over a common territory, but for separate and distinct purposes.[35] In his decisions he sought to maintain intact the sphere of power which constitutionally belonged to each sovereignty.

Among the States' rights leaders who were Taney's contemporaries, John C. Calhoun was the outstanding political thinker. When his ideas are contrasted with Taney's, points of sharp disagreement are easily noticeable. It seemed to Calhoun that sovereignty could not be divided. "Sovereignty

[32] *New Views of the Constitution of the United States*, p. 37.

[33] Notably in *Ableman v. Booth*, 21 Howard, 506 (1858).

[34] See *Dred Scott v. Sandford*, 19 Howard, 393 (1856).

[35] *Ableman v. Booth*, 21 Howard, 516 (1858).

is an entire thing;—to divide, is,—to destroy it."[36] He found it in the American system residing "unimpaired in the people of the several states. . . ."[37] The several States in their sovereign capacity, having ratified the Constitution by mutual agreement, stand in relation to it as the parties to a constitutional compact. As parties to the compact they retain the right to judge the extent of the obligations imposed by the compact, and may interpose to arrest within their respective limits an act of the federal government in violation of the Constitution and thus to prevent the delegated from encroaching on the reserved powers.[38] Calhoun argued that there is nothing in the Constitution to indicate that the Supreme Court is authorized to enforce its judgments against a State government in case of a conflict between State and national powers.[39]

Calhoun's successors to southern leadership followed him in the main outlines of their thinking.[40] Taney differs from them, as from Calhoun, in regard to the completeness of State sovereignty, and in regard to the method of maintaining the division between the powers of the national and State governments.

The Antecedents of Taney's Theory

In looking for the antecedents of Taney's theory of the nature of the Union we find that his ideas are very similar to those advanced by James Madison in number thirty-eight of the *Federalist* papers. *The Federalist* explained that the Union is partly federal and partly national. Ratification of the Constitution was to be by the people acting "not as individuals composing one entire Nation, but as composing the distinct

[36] *The Works of John C. Calhoun*, I, 146.
[37] *Ibid.*, p. 147.
[38] *Ibid.*, pp. 277-78.
[39] *Ibid.*, pp. 258-65.
[40] See A. H. Stephens, *A Constitutional View of the Late War between the States*, Vol. I; Jefferson Davis, *The Rise and Fall of the Confederate Government*, Vol. I.

and independent States to which they respectively belong."[41] In ratifying the Constitution each State acts as a sovereign body and is bound only by its own voluntary act. In this respect the government is federal, but the new government operates on the people rather than on the States, and in that respect it is national.[42] The power of the general government is limited to certain enumerated objects, and the States are left a residuary sovereignty over all other matters.[43]

That Madison's theory of the Union was almost exactly the same as Taney's seems indicated by opinions expressed in a letter which he wrote to Edward Everett in 1830. In the course of his letter, after discussing the formation of the Federal Constitution, Madison said:

> Being thus derived from the same source as the Constitutions of the States, it has within each State, the same authority as the Constitution of the State; and is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective spheres; but with this obvious & essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.[44]

Some of the ideas stated by James Wilson in the Pennsylvania convention which ratified the Constitution also bear a similarity to those later expressed by Taney. Wilson said that the proposed general government would take away power from the States in certain particulars, but that this should not prove alarming since the people are the source of all power. They can give one portion of power to the State governments and another to the government of the United

[41] *The Foederalist*, p. 262. [42] *Ibid.*, p. 264. [43] *Ibid.*, p. 265.

[44] *The Writings of James Madison*, IX, 386-87. President Monroe expressed similar ideas in his veto message of May 4, 1822. Richardson, II, 147-48.

States.[45] In regard to the possibility of disputes between the States and the national government over the boundary lines of power he said, "I hope, sir, they will not . . . resemble comets in conflicting orbits, mutually operating destruction; but that their motion will be better represented by that of the planetary system, where each part moves harmoniously within its proper sphere, and no injury arises by interference or opposition. Every part, I trust, will be considered as a part of the United States."[46]

In the course of the discussion of Taney's theory we have already noticed that there is a likeness between his ideas and those of John Marshall. In the broad outlines of their theory of the nature of the Union there is much similarity. However, Marshall did not always use the term sovereignty in the same sense in which Taney used it, and it is doubtful if he had quite the clear conception of two sovereign bodies of people that Taney had. When Taney speaks of the State as being sovereign he always means the *people* of the State, not its government. When he refers to the sovereignty of the nation he is thinking of the *whole* people. That Marshall had something of this idea might be implied from his statement in *Sturges v. Crowninshield*, referring to the powers of the States, "These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."[47] But later during the same term of Court we find him in *McCulloch v. Maryland* talking of sovereignty in terms of the powers of governments, and arguing that the Constitution was the product of the people, and not of the State governments,[48] a proposition which the leading thinkers

[45] Elliott, *op. cit.*, II, 443-44. [46] *Ibid.*, pp. 481-82. [47] 4 Wheaton, 193 (1819).

[48] After telling of the ratification by State conventions he says, "But the measures they adopt do not on that account, cease to be the measures of the people themselves, or become the measures of the State governments." 4 Wheaton, 403.

among the most radical of the States' rights leaders would not deny.

Mr. Justice Story, in his *Commentaries on the Constitution,* distinguishes between the different uses of the term sovereignty and says, "Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each State, not granted to any of its public functionaries, is in the people of the State."[49] This would seem to indicate that his conception of the location of sovereignty in the United States was very much the same as the theory which Taney wrote into his decisions.

It is evident that the roots of Taney's theory of the nature of the Union lie, not in the theory of Jefferson or Taylor or Calhoun, but in the writings of Madison, the ideas of James Wilson, and the previous decisions of the Supreme Court. In an age of conflict between States' rights advocates and the advocates of a new nationalism, when the bifurcate theory of sovereignty was becoming progressively harder to apply, Taney clung to the doctrine of the Fathers of the Constitution.

The Power of the National Government

A discussion of Taney's conception of the Union and the division of sovereignty in the United States is not complete without some notice of the leading cases in which he applied his theory. His decisions in cases involving specific powers of the national and State governments are as revealing of his theory as are his general statements. It is only after an examination of such decisions that one can satisfactorily compare him with John Marshall or the other great jurists who have dealt significantly with the same problem.

Where the power of the national government was in ques-

[49] Sec. 208.

tion Taney gave it such an ample interpretation and such freedom from all except clearly constitutional restraints as to give him good claim to be called a nationalist. An important decision of this nature was the one which he wrote in the case of *Holmes v. Jennison*,[50] a case involving the intercourse between the United States and foreign nations. In it he said, "It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation, and to cut off all communications between foreign governments and the several state authorities."[51] He denied the right of a State to extradite a person to a foreign nation, with the assertion that "The constitution looked to the essence and substance of things, and not to mere form."[52] He assigned exclusive power in such matters to the national government, saying:

> But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States. It is admitted, that an affirmative grant of a power to the general government, is not, of itself, a prohibition of the same power to the states; and that there are subjects over which the federal and state governments exercise concurrent jurisdiction. But where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive; and the same power cannot be constitutionally exercised by the states.[53]

In this decision Taney assumes that the national government has exclusive power and the States are deprived of power by implication wherever State action would be incompatible with a grant of power to the national government. Chief Justice Marshall laid down a similar rule in *Sturges v.*

[50] 14 Peters, 540 (1840).
[51] *Ibid.*, 575.
[52] *Ibid.*, 573.
[53] *Ibid.*, 574.

Crowninshield, a case involving bankruptcy laws, when he said, "Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it."[54]

Taney's decision in *Holmes v. Jennison* strengthened the national government and set limits to State power to such an extent that James Buchanan said of it, "I have always entertained the highest respect for the present distinguished Chief Justice of the United States; but I must say, and I am sorry in my very heart to say it, that some portions of his opinion, in this case, are latitudinous and centralizing, beyond anything I have ever read in any other judicial opinion."[55]

Taney believed that the central government not only had certain powers delegated to it, but that it had the right to execute these powers, by force if necessary. In his *Ableman v. Booth* decision he strongly defended the right of the central government to enforce its laws and judicial processes free from State interference. If a State attempted to interfere with the action of a federal officer in holding in custody persons accused of violating federal laws it would be the officer's duty "to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."[56] In his scheme of things the national government need brook no interference with the exercise of its constitutionally granted powers.[57]

Taney's nationalistic proclivities are revealed most clearly

[54] 4 Wheaton, 193 (1819). The Court applied a similar rule to interstate commerce in *Cooley v. Board of Wardens of the Port,* 12 Howard, 319 (1851). Although Taney did not write the decision in the latter case he was apparently one of the majority whose opinion it represented.

[55] *Congressional Globe,* 27th Cong., 2d Sess., Appendix, p. 388.

[56] 21 Howard, 524 (1858).

[57] See also *Official Opinions of the Attorneys General,* II (1825-1835), 565, 575-78.

in his opinions involving the jurisdiction and authority of the federal courts, especially in his opinions in admiralty cases. In the case of *Taylor v. Carryl*[58] involving a conflict of jurisdiction between State and federal courts, the majority of the Supreme Court upheld the right of the State court to assume jurisdiction. Taney dissented with a strong defense of the supremacy of the federal courts in admiralty cases. After admitting that the States are supreme within their sphere of action and that national officers are powerless to interfere with what they do in that sphere, he continued, "But if it is intended to say that, in the administration of judicial power, the tribunals of the States are to be regarded as the tribunals of separate and independent sovereignties, dealing with each in this respect upon the principles which govern the comity of nations, I cannot assent to it. The Constitution of the United States is as much a part of the law of Pennsylvania as its own Constitution. . . . The State courts have not, and cannot have, any jurisdiction in admiralty and maritime liens, to bring them into conflict with the courts of the United States."[59] Then he added, "The Constitution and laws of the United States confer the entire admiralty and maritime jurisdiction expressly upon the courts of the General Government."[60]

One of Taney's most important contributions to American law was embodied in his decision in the case of *Genesee Chief v. Fitzhugh*,[61] in which he interpreted admiralty jurisdiction as extending over all navigable waters in the United States, whether they were used for commerce between States or with other nations.[62] Prior to this decision the boundary of ad-

[58] 20 Howard, 583 (1857).
[59] *Ibid.*, 605.
[60] *Ibid.*, 606.
[61] 12 Howard, 443 (1851).
[62] Mr. Justice Brandeis said of this decision, in connection with a discussion of the desirability of disregarding the rule of *stare decisis*, "The existing admiralty jurisdiction rests, in large part, upon like action of the Court in *The Genesee Chief*, . . . In that case . . . a doctrine declared by Mr. Justice Story with the

miralty jurisdiction had been measured by the tidewater, in accordance with established English law.

Referring especially to the Great Lakes, and in answer to the objection that they were not under maritime jurisdiction because there was no tide on them, Taney said:

> Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, it would seem to be inconsistent with it.[63]

He called attention to the fact that tidewater and navigable waters had become synonymous terms in England because in that country there are no navigable waters beyond the ebb and flow of the tide. Because a similar situation existed in the original thirteen States the courts had accepted the English definition.[64] "The description of a public navigable river was substituted for the thing intended to be described."[65]

Taney's Genesee Chief decision was one dictated by sound common sense. It extended the power of the federal government to meet conditions as they existed, in accordance with the spirit of the constitutional provision. Charles Warren is probably right when he says that "Few decisions had ever produced so revolutionary a change in Federal jurisdiction as that of *The Propellor Genesee Chief v. Fitzhugh* . . .,"[66]

concurrence of Chief Justice Marshall, and approved by Chancellor Kent, was abandoned when found to be erroneous, although it had been acted on for twenty-six years." *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 238-39 (1924). Dissenting opinion.

[63] 12 Howard, 454.

[64] Mr. Justice Story applied the tidewater limitation rule in *The Steamboat Thomas Jefferson*, 10 Wheaton, 428 (1825).

[65] 12 Howard, 455.

[66] Charles Warren, *The Supreme Court in United States History*, II, 239.

but the decision was revolutionary in the sense that Taney broke the precedent of previous respected decisions of the Court and not in the sense that he sanctioned any unconstitutional acquisition of power by the federal courts. It was a nationalizing decision brought on by the changed conditions which resulted from the geographical growth of the country.

Limitations on Federal Power

Taney's decisions defining federal power did not always expand this power. When the relations between the States and the national government were involved, he was as careful to enforce the limitations on the power of the national government as he was to protect what he considered the constitutional sphere of power delegated to it. In the *Passenger Cases* he declared that the national government could not take away a reserved power of the States either by treaty or by a law of Congress.[67] It is notable, however, that in the whole time he was Chief Justice he wrote only one decision holding an act of Congress unconstitutional and this did not involve the relations between national and State power, but the power of the national government over the Territories.[68]

In the case of *Kentucky v. Dennison* he made it clear that he thought the national government had no right to exercise control over a State "in the administration of its internal concerns and reserved rights."[69] The suit was brought by Kentucky to compel the governor of Ohio to surrender a fugitive from justice wanted by Kentucky. Although regarding the duty of the surrender of the fugitive as absolute, Taney held that the national government had no power to compel the State to fulfill its obligation in this respect.[70] He

[67] 7 Howard, 466 (1848). Dissenting opinion.

[68] The act held unconstitutional was the Missouri Compromise, in *Dred Scott v. Sandford,* 19 Howard, 393 (1856).

[69] 24 Howard, 107 (1860).

[70] Taney's decision in this case has become the accepted interpretation of the law. J. B. Moore, *A Treatise on Extradition and Interstate Rendition,* II, 980-1004.

said, "And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might . . . impose on him duties incompatible with the rank and dignity to which he was elevated by the State."[71]

This decision was consistent with Taney's theory of the actual sovereignty of the States. It is conceivable that a judge without his clear conception of the relative independence of a State might have issued a writ of mandamus, assuming that since the State's duty was prescribed, the power of enforcement might be implied. But in Taney's theory of the two sovereignties, in the absence of a specific constitutional provision, the agencies of the national government would have no more power to force a course of action on a State, where relations of State and nation were not involved, than a State would have to force a course of action on the national government.

Neither did he believe that the national government could do by indirection what it might not do directly. During the administration of President Jackson, when it was proposed to distribute the surplus money in the federal treasury among the States, Taney expressed his disapproval of such a step. In the first place, he thought Congress could not rightfully raise more money than the needs of the central government required. In the second place, he thought that if Congress could raise more money than was needed, and distribute it among States or corporations, the power of the central government would be enormously enlarged. The government could then apply its moneys indirectly to any purpose that it desired to further.[72]

[71] 24 Howard, 108.

[72] Letter to Jackson, June 27, 1836. *Correspondence of Andrew Jackson*, V, 410.

The very thing that Taney warned against has become not uncommon in recent times. By means of grants-in-aid the federal government now exercises a powerful influence in education, road building, and agricultural work. Relief appropriations, the Reconstruction Finance Corporation, and other agencies which have been used to combat the depression have added immeasurably to the power of the federal government, and the end is not yet. That Taney would have opposed such roundabout ways of augmenting the power of the federal government seems indicated from the opinion referred to above.

The Power of the States

When one turns to Taney's decisions defining the power of the States it becomes evident that he regarded the authority of the States as of equal dignity and as equally deserving of protection as the authority of the national government. He held that no federal power could diminish in any way the reserved powers of the States.[73] The States were entitled to all of the prerogatives of sovereignty not surrendered to the national government. They were immune from suit without their own consent, even though they defaulted on their bonds.[74] A State could change its form of government at will, so long as it maintained a republican form of government as required by the Constitution.[75] It could impose whatever taxes it thought proper on persons or things within its dominion and apportion them as it thought best.[76] It could determine "the *status*, or domestic and social condition, of the persons domiciled within its territory" except so far as limited by the federal Constitution.[77] Whether the acts of a

[73] Dissenting opinion in *Passenger Cases*, 7 Howard, 466 (1848). *Official Opinions of the Attorneys General*, II (1825-1835) 474-77.

[74] *Bank of Washington v. State of Arkansas*, 20 Howard, 532 (1857).

[75] *Luther v. Borden et al.*, 7 Howard, 47 (1848).

[76] *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 428 (1853).

[77] *Strader et al. v. Graham*, 10 Howard, 93 (1850).

State were wise or unwise, just or unjust, was solely a matter for the consideration of the State.[78] In all questions which concerned only a State law or a State constitution the decision and construction of the State courts was final. Federal courts would accept such decisions as authoritative from the time that they were made.[79]

It is in his police power decisions that Taney contributed most to the constitutional interpretation of State powers. These decisions are so important as to require treatment in separate chapters. In them, as well as in some of the instances briefly mentioned above, Taney seems to depart from the nationalistic traditions of John Marshall's Court. He conceives of State sovereignty as having a vigor and completeness different from that in Marshall's conception, or in Story's. In a sense he is a strong defender of State's rights. But an analysis of his decisions shows that he did not take away power from the national government so much as he added to the power of the States.

The difference between the interpretations of Marshall and Taney is illustrated in the case of *Prigg v. Pennsylvania*,[80] where the Court held unanimously that State authorities could not interfere with the Fugitive Slave Law of the national government. Mr. Justice Story writing the decision of the Court held that the power of Congress on the subject was exclusive. Chief Justice Taney, agreeing that no State could interfere with the federal law, dissented from the proposition that a State law aiding the federal authorities would be unconstitutional. The difference is also illustrated in three important cases which were decided by the Court during Taney's first term as Chief Justice, namely *City of New York v. Miln*,[81] *Briscoe v. Bank of the Commonwealth of Ken-*

[78] *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 428 (1853).

[79] *Luther v. Borden et al.*, 7 Howard, 40 (1848); *Rowan et al. v. Runnels*, 5 Howard, 139 (1846).

[80] 16 Peters, 539 (1842).

[81] 11 Peters, 102 (1837).

tucky,[82] and *Charles River Bridge v. Warren Bridge*.[83] In each of these cases the power of the States was construed liberally, with Taney in the majority and Story dissenting. The question at issue in each instance was not a limitation on national power, but the extent of State power under the Constitution, in one case to discourage an influx of pauper immigrants, in another to allow a State owned bank to issue bills of credit, and in the Charles River Bridge case to allow competition with a chartered company.

Conclusion

Taney's theory of the nature of the Union is consistent with his general theory of sovereignty. Believing in the highly sovereign power of the people as their will is constitutionally established, he sought to allow free expression to their will whether in the delegated powers of the national government or in the reserved powers of the States. Considered as a grant of power to the national government he construed the Constitution liberally; considered as a limitation on the power of the States he construed it strictly. Both governments he regarded as the agents of the people, entitled to equal respect, and to equal protection in the exercise of their constitution-granted functions.

[82] 11 Peters, 257 (1837). [83] 11 Peters, 420 (1837).

VI

THE CHARLES RIVER BRIDGE CASE AND THE POLICE POWER

The American Conception of Police Power

As a result of the division of the powers of government in the United States a concept of police power has developed which is peculiar to American jurisprudence.[1] The term "police power" is commonly used to denote the power exercised by a legislature in restraining and limiting individual rights and actions for the public good.[2] The law of the police power is in a constant state of development because it deals with the individual in relation to his social and economic environment, which is continually changing.[3] It has come to occupy an increasingly important place in American law in modern times.

In the development of the American idea of police power Chief Justice Taney played an important part in a period when the whole doctrine was in its infancy. His decisions are of strategic importance because they helped to bridge the gap between the English theory of the sovereignty of Parliament and the modern American conception of the police power. In the early decisions of the Supreme Court where the expression "police power" appears, it is used as a term referring to the reserved sovereign powers of the States, and not as designating a particular branch of the State's authority.[4] During the time that Taney was Chief Justice the term was in the process of being narrowed down to mean particularly the power of the State to legislate for the protection of the

[1] W. W. Willoughby, *The Constitutional Law of the United States*, III, 1765.

[2] Ernst Freund, *The Police Power*, pp. 3, 17. See also Willoughby, *op. cit.*, p. 1774; and T. M. Cooley, *Constitutional Limitations*, 7th ed., p. 829.

[3] Freund, *op. cit.*, p. 3.

[4] Willoughby, *op. cit.*, p. 1766.

morals, safety, and general welfare of its inhabitants even though interstate commerce or some other subject of federal legislation might be incidentally affected.[5]

The general notion that the government has power to limit the rights and property of individuals for the social welfare is, of course, a very old one—perhaps almost as old as government itself. In England this power was exercised by Parliament and Parliament was supreme. In Sir William Blackstone's *Commentaries on the Laws of England* he summarizes and discusses the laws which deal with "public police." After discussing laws prohibiting unfair trade practices,[6] he devotes a chapter to "Offences against the Public Health and the Public Police and Oeconomy."[7] In the latter chapter he lists quarantine laws, laws against selling unwholesome provisions, laws against clandestine marriages, bigamy, common nuisances, idleness, luxury, gambling; statutes to preserve game and statutes for keeping gypsies out of the country. Some of the law on these subjects was a development of the Common Law, but in most cases Parliament had dealt with them by statutes. The power of Parliament to enact social legislation was not constitutionally limited.

Three things prevented the complete incorporation of the English doctrine into American law. In the first place, in the American system the powers of government were divided between the States and the nation. In the second place, there was a written constitution which limited the powers of both. Related to these factors, and of equal importance, was the interpretation given to the Constitution by the Supreme Court in the formative years when the Constitution was first being put into service. The Court in those days was very tender of private property rights and noticeably interested in

[5] See *ibid.*, pp. 1766-77.

[6] Book 4, Chap. 12, pp. 154-60.

[7] Book 4, Chap. 13, pp. 161-75.

strengthening the power of the national government.[8] In the United States there could be no such thing as the sovereignty of a legislature in matters of public welfare.

In the American system all of the powers of government not surrendered to the national government were regarded as having been reserved by the States.[9] It was generally conceded that power to make police regulations in purely internal affairs, except where the obligation of contracts was involved, was reserved to the State governments. In 1827, Taney and Reverdy Johnson in presenting a case before the Supreme Court based an argument on the assumption that the States had power to protect the public safety by regulating the handling of gunpowder in a crowded city, or to protect the public health by regulating the sale of articles dangerous or offensive to the public.[10] The Court speaking through John Marshall accepted the validity of the assumption without question.[11] Thus far there was no disagreement, at least on the surface. Grounds for disagreement were found mainly at two points of constitutional law; first, as to how far the States could go in police legislation which affected interstate or foreign commerce either directly or indirectly; second, as to how far the States could exercise their police power without impairing the obligation of contracts.

The Court under John Marshall established the doctrine that "Inspection laws, quarantine laws, health laws . . . as

[8] E. S. Corwin, *op. cit.*, p. 113; W. D. Coles, "Politics and the Supreme Court of the United States," *The American Law Review*, XXVII (1893), 182-208.

[9] Number 38 (Madison) in *The Foederalist*, p. 265.

Sturges v. Crowninshield, 4 Wheaton, 193 (1819); The idea is well put in a later case, *Munn v. Illinois*, 94 U. S. 124 (1876).

[10] *Brown et al. v. The State of Maryland*, 12 Wheaton, 427-28.

[11] "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain with the State. . . . We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering." *Ibid.*, 443-44.

well as laws for regulating the internal commerce of a state" were part of the reserved powers of the States[12] and laws of this nature could be enacted, unless they came into conflict with the authority of Congress over interstate or foreign commerce. The Court held that "congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce."[13] In *Brown v. Maryland*[14] the principle was established that a State cannot under the guise of the police power, or otherwise, levy any tax which may be construed as a tax on the importation of goods. The States were not to be allowed by taxation or otherwise to retard, burden, or in any way control, the laws of Congress constitutionally enacted.[15] When a State authorized the damming up of a small creek in order to enhance property values and protect the health of the citizens in its vicinity, Marshall held the State law constitutional on the ground that it was not repugnant to the federal power to regulate commerce in a dormant state or contrary to any law passed on the subject. But he hastened to emphasize that Congress had power to control even such small streams under its commerce power.[16] The police power of the States emerges from the first period of the Supreme Court definitely subordinated to the commerce power of the national government.

The Court in this period was equally solicitous in protecting the obligation of contracts against State legislation. Marshall held that the right to contract, and the obligation of contract, were not given by human legislation but were natural rights of man.[17] The Court under his leadership were zealous to protect these rights. They established the

[12] *Gibbons v. Ogden*, 9 Wheaton, 203 (1824).
[13] *Ibid.*, 206.
[14] 12 Wheaton, 419 (1827).
[15] *McCulloch v. Maryland*, 4 Wheaton, 436 (1819).
[16] *Willson v. Blackbird Creek Marsh Co.*, 2 Peters, 250-52 (1829).
[17] *Ogden v. Saunders*, 12 Wheaton, 346 (1827).

principle that a State could not release a party to a contract from any part of his obligation,[18] but they went even farther than that. In the Dartmouth College case Marshall held that a charter from the State to an individual or a group of individuals was a contract and could never be altered by the State.[19] On another occasion the Court held that when a contract of tax exemption is written into a charter it can never be withdrawn.[20] It will readily be seen that the police power of the States might be seriously circumscribed by these principles unless they should be modified by later decisions.

By the time of Taney's appointment to the Court the growth of the nation and the increasing number of corporations made some sort of modification imperative for the general welfare. Taney led the Court in a swing away from the strictest protection of contract property rights toward a new emphasis on the welfare of the community.[21]

Police Power in Conflict with Chartered Privileges

In the first term of Court after Taney became Chief Justice a case came up for decision in which the contract rights of a corporation clashed with the public interest.[22] The suit was between two bridge companies. In 1785, the legislature of Massachusetts had incorporated a company and authorized it to build the "Charles River Bridge" and collect tolls for its use. In 1828, the legislature incorporated another company called "The Proprietors of the Warren Bridge" and authorized it to build another bridge within a few rods of the Charles River Bridge. By the terms of this second charter the Warren Bridge was to be surrendered to the State as soon as the tolls received had reimbursed the owners for

[18] *Sturges v. Crowninshield,* 4 Wheaton, 197 (1819).
[19] *Dartmouth College v. Woodward,* 4 Wheaton, 625 (1819).
[20] *New Jersey v. Wilson,* 7 Cranch, 164 (1812).
[21] See Charles Warren, *The Supreme Court in United States History,* II, 34-35.
[22] *Charles River Bridge v. Warren Bridge,* 11 Peters, 420 (1837).

building and maintaining it, or at any rate within six years after they had begun to receive tolls. The Charles River Bridge Company sought to enjoin construction of the new bridge on the ground that it impaired the obligation of their contract with the State.

The immediate question before the Court was, does the grant of a charter to a corporation to build a toll bridge contain an implied contract that the State will not erect a free bridge nearby during the life of the charter? The larger issue may be stated in the words of the opposing attorneys. John Davis, counsel for the defendants said:

On one side, then are the rights to private property, sacred and inviolable, so far as they can be established; but claimed in the form of a burdensome tax on the public, and therefore entitled to no favor beyond strict right.

On the other side stands the public, complaining that they are tributaries to this great stock of private wealth and subjected to inconveniences still more burdensome from the want of suitable accomodations for intercommunication across the river, if this bridge is to be shut up; and denying that such claims of exclusive right can be justly or lawfully set up by the plaintiffs.[23]

Said Daniel Webster, counsel for the plaintiffs, "The promotion of public accomodation is no reason for taking away a privilege held under a legal grant. . . . The income derived from these rights shall not be diminished."[24] He contended that it was a question of the fair construction of a contract.

Coming at a time when the country was growing rapidly and methods of transportation were constantly being improved and routes extended, the case assumed particular immediate importance. And the general principle of the construction of corporation charters was of great importance for the future as well.

Chief Justice Taney delivered the Court's decision. Be-

[23] 11 Peters, 475. [24] *Ibid.*, 529.

fore considering the doctrine which it enunciated, it may be well to notice Taney's theory of the purpose of public utility corporations. In 1832, as Attorney General, speaking of another bridge company he said, "Certain privileges are given to them, in order to obtain a public convenience; and the interest of the public must, I presume, always be regarded as the main object of every charter for a toll-bridge or a turnpike road. The exclusive privileges are not given to the corporators merely for individual emolument, or from favoritism, but are granted as a compensation for the public convenience derived, from the work done by them, and are offered in the charter as inducements to individuals to undertake it."[25] Mr. Justice Brandeis expressed a similar idea in 1923 when he said in a public utility case, "The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the State in the performance of the public service; thus becoming a public servant."[26]

In approaching a question such as that involved in the Charles River Bridge Case, Taney thought in terms of the public welfare, whereas Marshall or Webster would have thought in terms of private property rights.[27] According to Taney's theory the corporation existed to serve the people, and not the government to serve the corporation. To him the granting of a charter to a corporation did not create for it any right, either God-given or constitutional, to make money indefinitely at the expense of the public. The charter was granted by the government for the benefit of the public. The government would faithfully observe its provisions, but could not be expected to do more. The keynote of his de-

[25] *Official Opinions of the Attorneys General*, II, 514.

[26] Dissenting opinion in *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S. 290-91 (1922).

[27] See Charles Warren, *The Supreme Court in United States History*, II, 34-35 and V. L. Parrington, *Main Currents in American Thought*, II, 23.

cision in the Charles River Bridge Case is to be found in the statement, "But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created."[28] Taney did not think of government as a mechanical arrangement which men endured because they must. It was a social organization for the promotion of human welfare. He did not think in terms of natural rights of individuals, but in terms of "the happiness and prosperity" of the community.

Concerning the principles of construction to be applied in the Charles River Bridge Case Taney said:

> The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In . . . the case of the proprietors of the Stourbridge Canal v. Wheeley and others, the court say: "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This . . . is a bargain between a company of adventurers and the public . . . and the rule of construction in all such cases, is . . . that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." . . .
>
> Borrowing, as we have done our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? . . . We think not; and it would present a singular spectacle, if, while the courts in England

[28] 11 Peters, 547.

are restraining, within the strictest limits, the spirit of monopoly and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.[29]

The rule was not so well established in American law as Taney's statement would seem to indicate. The Court had declared in previous cases that public grants to private interests were to be strictly construed,[30] but it had never before given the rule anything like the stringent interpretation that Taney gave it. The last paragraph quoted above from the Charles River Bridge decision furnishes a clue to the real reasons for the decision. Taney did not believe that the courts should give corporations anything by implication when the rights of the public were involved. We know from his opinions expressed in the war on the Bank that he was very critical of corporate monopolies held at the expense of the public. What he did in this case was to establish a new rule in American law. It was a piece of wise judicial statesmanship, but it cannot claim the sanction of precedent from John Marshall's court.

The Social Importance of Strict Construction of Charter Grants

Taney points out that America is an active and enterprising country growing in numbers and in wealth, and daily finding necessary new channels of communication for the "comfort, convenience, and prosperity of the people." A state ought never to be presumed to surrender its power to promote "the

[29] 11 Peters, 544-46.

[30] Taney cited four cases as precedent: *U. S. v. Arrendondo*, 6 Peters, 738 (1832). *Jackson v. Lamphire*, 3 Peters, 289 (1830). *Beaty v. The Lessee of Knowler*, 4 Peters, 168 (1830). *Providence Bank v. Billings and Pitman*, 4 Peters, 514 (1830).

happiness and prosperity of the community." Referring to the case at hand he continued,

And when a corporation alleges, that a State has surrendered for seventy years, its power of improvement and public accomodation, in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. . . . No one will question that the interests of the great body of the people of the State, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.[31]

The results of any other than a strict construction of such charters might well prove disastrous to internal improvements, Taney pointed out. The States had encouraged the building of turnpike roads, sometimes different ones along the same line of travel. Then in some cases railroads were built along the same route and the franchise of the turnpike company rendered worthless. Now, says Taney:

Let it once be understood, that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in rail-

[31] 11 Peters, 547-48.

roads and canals, upon lines of travel which have been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world.[32]

In this decision, and in his other opinions involving the police power, Taney was not merely legalistic in his thinking. He was alive to economic and social conditions. He proposes to interpret the law as "a vehicle of life," not establish principles that will serve to hold back the nation's continuing development. He is a progressive agrarian in his outlook, a Jacksonian, who not only lays down progressive principles of law, but also views with a jealous eye any attempt of corporate wealth to hang on to privileges that may be harmful to the general welfare.

The essence of the Charles River Bridge decision is found in the following terse statements:

Does the charter contain such a contract on the part of the State? . . . If a contract on that subject can be gathered from the charter it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey.[33]

The Conservative Viewpoint

In the eyes of the conservatives this decision was rank heresy. Justice Story dissented from it with a long and carefully developed opinion. To him it was a break away from "the old

[32] 11 Peters, 551-53. [33] 11 Peters, 549.

law." By its "speculative niceties or novelties" the Court's decision endangered the title-deeds of those who held rights by public grants. A charter should be construed by the same rules as any statute. The Court should seek to find the legislative intent and give it "a full and liberal operation."[34] Chancellor Kent roundly condemned Taney's decision and commended Story for his dissent. He saw in the decision an injury to the moral sense of the community, and he wrote, "I abhor the doctrine that the Legislature is not bound by everything that is necessarily implied in a contract in order to give it effect and value."[35] Pessimism prevailed among the Tories. The decision of the Court was strong evidence that the fierce democrats who now controlled it were going to tear down some of the most sacred pillars of the economic order.

Justice Story and the other conservatives were afraid that the principle established in the Dartmouth College Case[36] was being overthrown. The principle was that a charter is a contract, the property rights of which will be protected by the federal courts. In the Charles River Bridge decision Taney did not deny the validity of Marshall's doctrine of the contractual nature of charters, but he did lay down a rule of construction that would have made the Dartmouth College decision improbable had Marshall followed it. Taney's Court did not reverse Marshall's decision but it did restrict its efficacy—fortunately for the general welfare in the days of prolific corporations that lay ahead.

The Dartmouth College decision gave corporations privileges which they had not had under the Common Law. It interpreted the "obligation of contracts" clause in a way that its framers probably never dreamed that it would be in-

[34] 11 Peters, 555.

[35] Quoted in Charles Warren, *The Supreme Court in United States History*, II, 29.

[36] 4 Wheaton, 518 (1819).

terpreted.[37] The doctrine that charters were contracts and entitled to constitutional protection was doubtless not a harmful one if applied with moderation, but if given a generous interpretation it would seriously curtail the power of the legislatures. There was danger that the doctrine would be pushed much too far by its advocates.[38] Taney checked the development and pruned off its growth. His decision has met with the general approval of the bar.[39]

The Significance of the Charles River Bridge Decision

The Charles River Bridge decision was a Magna Carta in American law. One writer has said of Taney,

> It was due to him more than to any other man that the power of the States to make internal improvements was retained at a time when it was peculiarly necessary that they should have full liberty, unrestrained by any constitutional limitations, to sweep away excrescences and obsolete institutions and build anew works adequate to the times and to the future. This power the Chief Justice preserved . . . in Charles River Bridge *v.* Warren Bridge . . . where he laid down the doctrine that a State in granting a franchise could not be presumed to have made also an implied contract, which in effect would guarantee the value of the franchise.[40]

In giving State legislatures added freedom to regulate corporations and legislate for the general welfare the decision opened the way for the development of effective police power legislation. Some of the results may be seen in succeeding decisions where it has been cited for support. Mention of a few of the cases in which it has been referred to will serve as some indication of the nature of our inheritance from the principle which Taney established in American law.

[37] "Legislative Control over Railway Charters," *American Law Review,* I (1867), 451-52.

[38] George W. Biddle, in *Constitutional History of the United States as Seen in the Development of American Law,* pp. 132-33.

[39] *Ibid.,* p. 133.

[40] F. R. Jones, "Roger Brooke Taney," *The Green Bag,* XIV (1902), 7.

In *Knoxville Water Company v. Knoxville*[41] the Supreme Court held that a contract between a city and a water company which provided that the city should not enter into any agreement with any other person or corporation to get its water from them, did not preclude the city from establishing its own waterworks. In making its decision the Court quoted the rule laid down by Taney in the Charles River Bridge Case and reaffirmed it.[42]

In 1907, a federal court held that a city franchise to a telephone company setting maximum rates did not bar the city from ordering the rates lowered during the life of the franchise. The court declared that the power to regulate public utility rates falls within the police power of the State, and where parties claim its abandonment or suspension the rule is that of strict construction laid down in the Charles River Bridge Case.[43] State courts have cited the Charles River Bridge decision, in upholding the power of a city to tax a street railway company for the improvement of the streets along which its tracks ran,[44] in requiring a railroad company to pay for overhead bridges built by a city over its tracks,[45] and in holding that a city might construct its own electricity plant even though by so doing it might practically ruin the franchise which it had previously granted to a private corporation.[46] These applications of Taney's principle, all of them since 1900, are indicative of its importance as an integral part of the law of modern public utility regulation.[47]

When Taney wrote his decision the conservatives thought

[41] 200 U. S. 22 (1901). [42] *Ibid.*, 37-38.

[43] *Home Telephone & Telegraph Co. v. City of Los Angeles et al.*, 155 Fed., 554, 570, 571 (1907).

[44] *Oklahoma City v. Shields*, 100 Pac., 559-72 (1908).

[45] *St. Louis v. St. Louis & S. F. R. Co.*, 129 S. W. 691-99 (1910).

[46] *Clark v. City of Los Angeles*, 116 Pac., 722-25 (1911).

[47] See also *State v. St. Paul etc. Ry. Co.*, 108 N. W. 261-67 (1906); *Boise City v. Boise Artesian Hot and Cold Water Co.*, 186 Fed., 710 (1911); *Territory v. Long Bell Lumber Co.*, 99 Pac., 918 (1908).

it destructive of the fundamental principles of constitutional law, yet Taney and the conservatives were looking at the same clause in the Constitution. Their interpretations were different because their conceptions of the proper function of government were different. If the purpose of government is primarily the protection of private property rights, statutes which threaten to limit the income from property should be enacted only in cases of great necessity. If the purpose of government is the promotion of happiness and prosperity of the community, legislation which tends toward that end is legitimate even though it curtails the dividends of particular individuals. Taney took the latter view. His theory of government left the way clear for legislation made desirable by the economic and social changes of his own time and those which have come with increasing rapidity in the years since then.

VII

THE EXTENSION OF THE POLICE POWER

The Liberalization of the Judicial Attitude toward Police Power Legislation

TANEY CAME to the Supreme Court in a period of increasing social legislation by the States. The public demand for the construction of canals and railroads, for free schools, for laws dealing with immigrants, for anti-liquor legislation, and for the abolition of slavery led to increased activity on the part of State legislatures.[1] If the legislatures were to carry out the program demanded by the people it was necessary that the courts be guided by constitutional theory that would not seriously interfere with it. Chief Justice Taney's theory would allow the States almost complete power to enact legislation for the welfare of their citizens. Some of his ideas along that line were revealed during the first term of Court after he became Chief Justice, as we have already noticed, in the Charles River Bridge decision. When Taney came to the Court a majority of its members were Jackson appointees and most of them were willing to go along with him in writing into the law of the Court a liberal interpretation of the police power.

A liberalization was already in process in the State courts. A change of atmosphere became noticeable in the twenties when the increased popular control of government began to make itself felt. In 1826, the New York Supreme Court in upholding a city ordinance forbidding the use of certain premises as a cemetery, in spite of a previous grant, asserted that the city officers had no power "to make a contract which

[1] See E. S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," *Harvard Law Review*, XXIV (1911), 460-61.

should control or embarrass their legislative powers and duties."[2] In 1831, another State court upheld the right of a city government to fill up a creek as a public health measure, even though by so doing they might to some extent interfere with private rights without providing for compensation.[3] Several years later in *Commonwealth v. Alger*[4] Chief Justice Shaw of the Massachusetts court declared, "All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare."[5] And just a little later in his decision he gave his widely quoted definition of the police power, defining it as "the power vested in the legislature by the constitution, to make, ordain and establish all manner of reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[6] In giving a wider scope to the powers of the State legislatures, Taney's Court was following a trend already begun by the State courts and continued by them until the Civil War.[7]

Questions connected with the development of the police power sometimes resolved themselves into questions of the extent of the legislative power in general. Some of the earlier jurists had believed the legislature limited by natural law. Justice Chase had said, "There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legis-

[2] *Brick Presbyterian Church v. the City of New York*, 5 Cowen, 538-40.

[3] *Edmund Baker v. The City of Boston*, 12 Pickering, 184, 194 (Mass.). See also *Commonwealth v. William Tewksbury*, 11 Metcalf, 55 (Mass. 1846).

[4] 7 Cushing, 53 (Mass. 1851).

[5] 7 Cushing, 85. [6] *Ibid.*

[7] See also *Stuyvesant v. The Mayor of New York*, 7 Cowen, 588 (N. Y. 1827); *Thorpe v. The Rutland and Burlington Railroad Co.*, 27 Vt., 142 (1854); *State v. Noyes*, 10 Foster, 279 (N. H. 1855).

lative power. . . ."[8] And John Marshall had asserted, "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."[9]

The courts of the Jacksonian era tended to discard this theory and to regard the legislature as supreme except where it was limited by either State or national constitution. In 1856, the Michigan Supreme Court stated that the legislature "must possess all the powers of a sovereign state except such as are withheld by the state constitution and such as are conceded to the general government."[10] This theory was the one accepted by Chief Justice Cooley[11] and it represents also the view of Mr. Justice Holmes.[12] That this was substantially the theory held by Chief Justice Taney may be gathered from the fact that he never refers to natural law as limiting the legislature. He does not talk of natural rights. The only limitations which he refers to as applying to the State legislatures are constitutional ones. In all cases involving State legislation he was willing to leave the matter of constitutionality entirely up to the State courts unless a federal question was involved.

The State's Power over Immigration

During the same term of the Supreme Court at which the Charles River Bridge case was decided a case came up which involved the constitutionality of a New York immigration law.[13] The New York statute required masters of ships arriv-

[8] *Calder v. Bull*, 3 Dallas, 388 (1798).

[9] *Fletcher v. Peck*, 6 Cranch, 135 (1810).

[10] *People v. Gallagher*, 4 Mich., 244 (1854). See also *Goddard v. Jacksonville*, 15 Ill., 589 (1854); and *State v. Noyes*, 10 Foster, 279 (N. H. 1855).

[11] *Op. cit.*, p. 126.

[12] Dissenting opinion in *Tyson v. Banton*, 273 U. S. 446 (1926).

[13] *City of New York v. Miln*, 11 Peters, 102 (1837).

ing in New York City to report certain information concerning their passengers to the city officials so that the city could take steps to prevent the settlement of immigrants who were likely to become paupers. In a decision written by Justice Barbour the Court upheld the constitutionality of the law as a valid exercise of the police power. Chief Justice Taney was one of the majority whose opinion the decision represented. The decision held that the law was a regulation not of commerce, but of police. The object was to prevent an inflow of foreigners who were likely to become chargeable on the city as paupers. The means used was the requirement of a report from masters of ships. Both the end and the means were within the competency of the States, said the Court. "We choose to plant ourselves on what we consider impregnable positions. They are these: That all those powers which relate to merely municipal legislation, or what may perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."[14] Justice Story dissented, holding that the law interfered with the commerce power of the national government. His dissent is probably an indication of what the decision of John Marshall's Court would have been. The difference between his dissent and the Court's decision marks the difference between the old Court and the new.

In 1848 the Court was again forced to decide on the constitutionality of State laws affecting immigration. The case of *Norris v. City of Boston* involved a Massachusetts statute and the case of *Smith v. Turner* involved a New York statute. They were considered together and reported under the head *Passenger Cases*.[15] The Massachusetts law provided for inspection by city officials of immigrant passengers on incoming ships. If any immigrants were found who were considered

[14] 11 Peters, 139. [15] 7 Howard, 283.

likely to become a public charge they were not to be allowed to land until the master of the ship had posted a bond in each case that the passenger in question would not become a public charge within ten years. The New York law required the payment of a small tax on each passenger on entering ships, the money derived from this source to be used to maintain a marine hospital. The majority of the Court held both of these laws unconstitutional. However, there was wide disagreement in the reasoning of the justices, and numerous opinions were written.

Chief Justice Taney wrote a dissenting opinion in which he upheld the constitutionality of the laws. To him the laws seemed a reasonable exercise of the police power reserved by the States. In speaking of the Massachusetts law he said, "Massachusetts deems the introduction of aliens into the State from foreign countries likely to produce in the State a numerous pauper population, heavily and injuriously burdensome to its citizens. It would be easy to show, from the public history of the times, that the apprehensions of the State are well founded; that a fearful amount of disease and pauperism is daily brought to our shores in emigrant ships, and that measures of precaution and self-defence have become absolutely necessary on the Atlantic border."[16] These statements show his keen appreciation of the problems faced by the seaboard States as a result of the increasing influx of immigrants. But to him it was not fundamentally a question of the reasonableness of the law, and he added, "Whether this law was necessary or not is not a question for this court; and I forbear, therefore to discuss its justice and necessity. This court has no power to inquire whether a State has acted wisely or justly in the exercise of its reserved powers."[17]

[16] 7 Howard, 467-68.

[17] 7 Howard, 468. Compare with the statements of Mr. Justice Holmes: "It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious

He pointed out that the real question involved was one of power. He said:

And the first inquiry is, whether under the Constitution of the United States, the federal government has the power to compel the several States to receive . . . every person or class of persons whom it may be the policy or pleasure of the United States to admit. . . . I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. . . . For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which the court could neither recognize nor enforce.[18]

Taney says he had supposed the question of a State's right to expel persons deemed dangerous or undesirable was no longer open to dispute. On several previous occasions the Court had distinctly decided that the States had that power. To him it was equally clear that if a State "may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering. . . . Neither can this be a concurrent power . . . the sovereignty which possesses the right must in its exercise be alto-

or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." *Lochner v. New York*, 198 U. S. 75 (1904). Dissenting opinion. See also his decision in *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 365 (1909).

[18] 7 Howard, 465-66. The decision of *Missouri v. Holland*, 252 U. S. 416 (1920) would seem to be contrary to this doctrine.

gether independent of the other."[19] His own conclusion, "both upon principle and upon the authority of adjudged cases," was that the States had retained the power, both to expel from and to prevent from entering their boundaries all persons deemed dangerous or injurious to the welfare of their citizens. And the State had the exclusive right to determine whether or not the danger existed, "free from the control of the general government."[20]

The Relation between the Police Power and the Commerce Power

In discussing the relation between these laws and the commerce power of the national government Taney asserted that passengers are not imports.[21] In a note at the close of the opinion he added, "It has been said in the discussion of these cases . . . that *commerce* means *intercourse;* and that the power granted to regulate it ought to be construed to include intercourse." If this was an attempt by a substitution of words to read into the Constitution an enlargement of national power and a corresponding diminution of State power it was utterly unwarranted, according to his canons of constitutional construction. He said, if the word *intercourse* "means nothing more than the word *commerce,* it is merely the addition of a word without changing the argument; but if it is a word of larger meaning, it is sufficient to say that then this court cannot substitute it for the word of more limited meaning contained in the Constitution."[22]

It will be seen from Taney's opinion in this case that he believed that the States had a wide independence in the exercise of their police powers. The national government had no right to infringe on these powers either by statute or by treaty. The authority being reserved by the States, and

[19] 7 Howard, 466.
[20] *Ibid.*, 467.
[21] *Ibid.*, 477.
[22] *Ibid.*, 493.

wholly in their hands, was to be exercised at their discretion. Whether they used it wisely or not, or whether they used it at all, was a matter over which the national government had no control.

Taney had before this expressed his belief that the national government could not infringe on the reserved powers of the States even in the exercise of its treaty making power. In 1831, while he was Attorney General he had expressed an opinion that the national government could not by treaty interfere with the right of a State to prohibit slavery within its territory.[23] Speaking for the Supreme Court in the case of *Holmes v. Jennison* in 1840 he said, "The power to make treaties . . . was designed to include all those subjects, which, in the ordinary intercourse of nations, had usually been made subjects of negotiation or treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments."[24]

In a later case involving the relation between the police power of the States and the commerce power of the national government Taney, speaking for the Court, upheld the power of a port city to make police regulations for its harbor.[25] A collision of ships had occurred in the harbor of Charleston and it was alleged that one ship had violated regulations established by ordinances of the city. The regulations provided that no ship should lie in the thoroughfare for more

[23] *Official Opinions of the Attorneys General*, II (1825-1835), 477.

[24] 14 Peters, 569.

[25] *Brig James Gray v. Ship John Fraser et al.*, 21 Howard, 184 (1858). In 1851 in the case of *Cooley v. Wardens of the Port*, when a similar question was at issue the Court had said of the commerce power of the national government, "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain." 12 Howard, 319. Although Taney did not write this decision he was one of the majority whose judgment it represented.

than twenty-four hours and required all vessels anchored in the harbor to keep a light burning on board from dark until daylight. In his decision of the case Taney said that such regulations were necessary in all ports for the convenience and safety of commerce. "And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail." These regulations must be obeyed by all ships, no matter from what part of the world they may come. And, he asserted, there is nothing in such regulations which conflicts with any law of Congress regulating commerce or with the admiralty jurisdiction of the federal courts.[26]

The Power to Regulate the Liquor Traffic

Perhaps the most interesting exercise of the police power in the reforming period which we are discussing came in the decade from 1846 to 1856. In those ten years sixteen States passed anti-liquor laws, more or less drastic in nature.[27] These laws were a severe strain on the doctrine of vested rights. In some instances they were attacked on the ground that they violated natural rights, in others on the ground that they were contrary to the commerce power of the national government. In most cases these laws were upheld by the State courts, which were inclined to leave the definition of the police power essentially to the discretion of the legislatures.[28]

In 1847, the Supreme Court of the United States put a

[26] 21 Howard, 187-88.

[27] E. S. Corwin, "The Doctrine of Due Process of Law before the Civil War," *Harvard Law Review*, XXIV (1911), 460-79.

[28] See *State v. Noyes*, 10 Foster, 279 (N. H. 1855); *Goddard v. Jacksonville*, 15 Ill., 589 (1854); *People v. Gallagher*, 4 Mich., 244 (1856). An exception to the rule was *Wynehamer v. State of New York*, 13 N. Y. 378 (1856).

damper on the argument that such laws were repugnant to the commerce power of the national government. In that year three cases came before the Court involving State laws which aimed to discourage the use of hard liquors by prohibiting their sale in small quantities and by dealers without licenses obtained from State authorities.[29] The laws were alleged to be unconstitutional on the ground that they were an infringement on the national government's power over interstate and foreign commerce.

Chief Justice Taney delivered the decision of the Court. In the beginning he declared that a law of Congress regulating interstate or foreign commerce must be supreme, and any State law conflicting with such a regulation would have to be set aside. But the States had never surrendered power over trade and commerce within the State. He pointed out that these principles had never been questioned, that the difficulty lay in applying them. It was not always easy to draw the line between foreign and domestic commerce and tell just where one left off and the other began. The Court had already laid down the "original package" doctrine in the case of *Brown v. The State of Maryland*.[30] Although Taney had been counsel for the State of Maryland in that case, and had at the time thought the original package doctrine a wrong interpretation of the Constitution, he says now, "But further and mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them."[31] Recognizing the rule as authoritative he proceeds to apply it to the cases at hand. It is perhaps well to remember in this connection that Taney and Marshall usually gave outward

[29] *License Cases*, 5 Howard, 573. [30] 12 Wheaton, 419 (1827).
[31] 5 Howard, 575.

allegiance to the same principles, but their interpretations differed at vital points.

Applying the original package doctrine to the liquor license laws in question, Taney says that if the State laws come in conflict with acts of Congress by attempting to obstruct the importation or sale of liquors in the original container in which they were imported, after Congress has authorized their importation, the State laws must be held void. It had been suggested in the argument of the case that if a State considered traffic in hard liquor to be injurious to its citizens and productive of "immorality, vice, and pauperism" it might constitutionally refuse to permit its importation notwithstanding the laws of Congress. The contention was that a state could do this on the same ground that it could resist "the introduction of disease, pestilence, or pauperism from abroad." At this point Taney makes a distinction which is designed to clarify the line between the police power of the States and the commerce power of the national government. He says,

> But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction.[32]

[32] 5 Howard, 576-77.

We may infer from these statements that Taney believed the commerce power of the national government to be concerned primarily with *things* which were property and could be bought and sold. In his dissenting opinion in the *Passenger Cases*, already referred to, he declared that passengers were not imports.[33] Over all matters which were legitimate subjects for the police power, except the traffic in the *things* in interstate and foreign commerce, Taney was willing to give the States complete power. Although one should be aware of the danger of reading too much into a decision, it is perhaps fair to assume also that Taney would have been very conservative about allowing the national government to exercise what has come to be called national police power. One cannot help believing that he would probably have agreed with the decision of the Court in the child labor case of *Hammer v. Dagenhart* in which it declared, "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. . . . The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."[34] Taney's distinction between the powers of the national and State governments was too nice to allow the national government to encroach on the sphere reserved by the States.

In the *License Cases* Taney interprets the State laws in question as not interfering with traffic in liquor while it is still a part of foreign commerce, that is, while it is still in the hands of the importer for sale in its original package. The laws act on the retail trade within the State. They affect the article after it has become a part of the general mass of property in the State. Taney lays down a rule which establishes the complete independence of the State, in the exercise

[33] 7 Howard, 477.

[34] 247 U. S. 273-74 (1917).

of its police power, to enact legislation affecting traffic in articles after they have ceased to be a part of foreign commerce, even though such legislation may take all the profits out of importation. He says,

> These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.[35]

The spirit of these statements is the same as that of Mr. Justice Holmes when he says in *Erie Railroad Company v. Board of Public Utility Commissioners et al.*, "To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. . . . If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever misfortunes the stopping may produce."[36]

One of the license laws involved was a New Hampshire statute prohibiting the sale of distilled liquor without a license from the officials of the town in which the liquor dealer lived. The plaintiffs in error in this case had imported a barrel of liquor from Boston and sold it in the cask in which it was imported, without a license. In discussing this case

[35] 5 Howard, 577. [36] 254 U. S. 411 (1920).

Taney said that the power of Congress to regulate interstate commerce was coextensive with its power to regulate foreign commerce. The question at issue was whether a State is prohibited by the Constitution of the United States from making any regulations of foreign or interstate commerce "although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void."[37] The Court were divided on that question. Taney thought that a mere grant of power to the federal government could not be construed as an absolute prohibition to the States to legislate on the same subject. After acknowledging that Congress had "the controlling and supreme power" over interstate and foreign commerce he said, "Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."[38] He backed this contention by pointing to the language of the Constitution and to State laws which had been passed, and by referring to the previous decisions of the Court.[39]

Taney's Definition of Police Power

It had been contended in the argument before the Court that quarantine and health laws were passed by the States by virtue of their police powers and not by virtue of a power to regulate commerce. Taney disagrees with this interpretation of the police power, and gives it a broad definition. He says,

But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sov-

[37] 5 Howard, 578. [38] *Ibid.*, 579. [39] *Ibid.*, 579-81.

ereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.[40]

Taney thus makes police power synonymous with the reserved powers of the States. It is the power inherent in sovereignty, which in the United States resides in the States except as it is abridged by the federal Constitution. Since the Civil War there has not been so much talk of the sovereign powers of the States, and the Fourteenth Amendment by its "due process of law" limitation on State power has affected the development of the conception of police power. There has been a tendency to try to give the police power a more specific definition than Taney's. In spite of these facts Taney's definition has been widely quoted in modern cases. As modern attempts at definition of the police power are enlarged to cover new and varied subjects of legislation, they approximate more closely Taney's broad inclusive definition.

The usefulness of Taney's definition, and its continuing influence on the development of the law, is indicated by the number and the character of the decisions in which it has been quoted or cited. For example, it has been quoted, upholding a State law designed to prevent the maintenance of sweatshops,[41] upholding the right of a State to regulate rates of public service corporations,[42] upholding the levying of a

[40] *Ibid.*, 583.

[41] *State v. Hyman*, 57 Atlantic, 6, 9 (Md. 1904).

[42] *St. Louis Southwestern Ry. Co. v. Allen et al.*, 187 Fed., 290-97 (1911).

drainage tax,[43] upholding a State law preventing the passage of sewage into streams used for drinking water,[44] and upholding a State law regulating prices charged by grain warehouses.[45] It was quoted in 1934 in the Court's decision in the case of *Nebbia v. New York,* upholding a State law fixing the retail price of milk.[46] In these and in other cases in which it has been used the broad definition of police power which Taney wrote into the law has been used by the courts in upholding legislation enacted in recognition of changed economic and social conditions or in response to an increasing demand for social justice.[47]

Later decisions of the Supreme Court have impaired the authority of Taney's decision that the State might pass legislation directly affecting interstate commerce as long as it did not conflict with federal legislation. The Court has accepted the doctrine that the failure of Congress to legislate on matters directly affecting interstate commerce is equivalent to a mandate that it shall be free. Under this principle it was held that a State could not prevent the importation of liquor from another State and that it could not prohibit the sale within its territory of liquor in the original package by a citizen of another State.[48] As a result of such decisions Congress enacted legislation to protect the dry States from interstate shipments of liquor.[49]

[43] *Houck et al. v. Little River Drainage District et al.,* 154 S. W. 739-41 (Mo. 1913).

[44] *City of Durham v. Eno Cotton Mills,* 54 S. E. 453-63 (N. C. 1906).

[45] *Munn v. Illinois,* 94 U. S. 113 (1876).

[46] 291 U. S. 524.

[47] See also *Railroad Commission v. Louisville & N. R. Co.,* 80 S. E. 327, 332-33 (Ga. 1913); *State v. Standard Oil Co. et al.,* 116 S. W. 902, 1019 (Mo. 1909); *Waters-Pierce Oil Co. v. State,* 44 S. W. 936-40 (Tex. 1898); *Laurel Fork & Sand Hill R. Co. v. W. Va. Transportation Co.,* 25 W. Va., 324, 349-50 (1884).

[48] *Bowman v. Chicago & N. W. Ry. Co.,* 125 U. S. 465 (1888); *Leisy v. Hardin,* 135 U. S. 100 (1890). T. M. Cooley, *op. cit.,* pp. 846-47.

[49] Notably the Webb-Kenyon Act. See Charles Warren, *The Supreme Court in United States History,* II, 732.

Taney's opinion that the liquor traffic within the State was a legitimate subject of regulatory and restrictive legislation and that a State might destroy the retail market for imported goods has had a continuing influence on cases involving police power legislation. In 1900, the Supreme Court of the United States quoted Taney in upholding a Tennessee law prohibiting the sale of cigarettes on similar grounds.[50] The Supreme Court of Illinois has used the same reasoning in upholding a State law directed against the sale or possession of certain kinds of wild game during specified seasons, whether the game was killed in the State or shipped in from another State.[51] The Supreme Court of the United States and numerous State courts have cited or quoted from Taney's *License Cases* decision in upholding various State liquor laws.[52]

Taney's Conception of the Police Power an Outgrowth of his Doctrine of State Sovereignty

The decision in the *License Cases* embodied Taney's theory of the absolute power of the State to legislate in whatever way its legislators thought would promote the welfare of its citizens, so long as it did not directly interfere with a constitutional exercise of power by the federal government, or with the provisions of the Constitution itself. The principles laid down in that decision have been used to sustain varied statutes representing legislative attempts to protect the health, morals, or welfare of citizens. It is a doctrine that allows wide freedom for social experimentation by the States.

Professor Mott has intimated that Taney was the first jurist to suggest due process of law as a limitation of the

[50] *Austin v. Tennessee*, 179 U. S. 343-50.

[51] *Magner v. The People of Illinois*, 97 Ill., 320, 335-36 (1881).

[52] E. g. *Mugler v. Kansas*, 123 U. S. 623, 664 (1887); *Niles v. Rhodes*, 7 Mich., 374, 384 (1859); *Santo, et al. v. The State of Iowa*, 2 Ia., 165, 194 (1855); *Ex parte Woodward*, 61 Southern, 295, 297 (Ala. 1912).

police power, because in the Dred Scott Case he held the federal government powerless to bar slavery in the Territories on the ground that it would take away private property without due process of law and hence violate the Fifth Amendment.[53] If it is true that Taney originated the idea he did it inadvertently. His opinion in the Dred Scott Case shows that he thought the national government much limited in its control over the Territories subject to its government and wholly without any such wide range of power as that comprehended in the police power of the States. It is probably fair to assume that had Taney lived to interpret the Fourteenth Amendment he would have construed it strictly. It was his practice to construe every constitutional limitation on a State's freedom of action over its domestic concerns strictly and with regard for the purposes for which it was established.

Chief Justice Taney's theory of the broad nature of the police power and the independence of the States was in harmony with the liberal tendency of his time. The States were enabled to meet new social problems without fear of judicial disapproval such as would doubtless have met their legislation in the days of John Marshall's nationalizing court. While Taney acknowledged the supremacy of national legislation in the proper sphere he did not believe that the Constitution meant the grants of power to the national government to exercise a crippling influence on the police power reserved by the States. His decisions are forerunners of modern liberal police power decisions.

Although Taney in his *License Cases*[54] decision defined police power as "nothing more nor less" than the reserved sovereignty of the States, it is noticeable that the important cases in which he took part, involving the power of the State

[53] Rodney Mott, *Due Process of Law*, pp. 327-29.

[54] 5 Howard, 583.

to protect the public health or the public morals or the public safety or the general welfare, were those involving also either the contract clause or the commerce power of the national government. The concept of the police power in action was being worked out mainly in the conflict between the State legislation on such matters and the commerce power of the national government. State laws to prevent pauperism caused by immigration,[55] to protect the public health by regulating or prohibiting the liquor traffic,[56] to protect the public safety and convenience by means of regulations of harbor traffic,[57] were all attacked before the Court on the ground that they interfered with the commerce power of the national government. In every case of this nature that came before his Court Taney voted in favor of sustaining the legislation of the States.

Since the adoption of the Fourteenth Amendment the due process clause has been applied as a limitation on legislation which purports to exercise the police power of the States. Private interests threatened by legislation intended to further the general welfare have sought protection in the Fourteenth Amendment. The conflict between due process of law and the legislative power of the States has led to the further development of the concept of the police power.[58] The liberal members of the Court have favored a policy of little interference with the police power of the States. The conservatives have been very free in declaring such legislation unconstitutional.[59]

[55] *City of New York v. Miln,* 11 Peters, 102 (1837); *Passenger Cases,* 7 Howard, 283 (1849).

[56] *License Cases,* 5 Howard, 554 (1846).

[57] *Brig James Gray v. Ship John Fraser,* 21 Howard, 184 (1858); see also *Cooley v. Board of Wardens of the Port,* 12 Howard, 299 (1851).

[58] Willoughby, *op. cit.,* III, 1765. See also R. A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harvard Law Review,* XL (1927), 943-68.

[59] R. A. Brown, "Police Power—Legislation for Health and Personal Safety," *Harvard Law Review,* XLII (1929), 868.

The use in our time of due process of law as a limitation on the police power is not unlike the use before the Civil War of the contract clause and the commerce power as limitations on the police power. Two of the dominant objectives of Marshall, and probably of the other conservatives of the early period as well, were the maintenance of the sanctity of private property rights and the establishment of the finality of judicial interpretation of the law. If Marshall felt that he needed more support than the Constitution gave him in protecting property rights, he appealed to natural law.[60] No one will question the fact that the dominant motive in nearly all modern decisions against police power legislation is the desire to protect private property rights. Nor can it be doubted that the conservatives have a high conception of judicial supremacy when one recollects that Mr. Justice Brewer held 41 per cent of the police power legislation that came before him unconstitutional, that Mr. Justice Peckham made a similar record, and that Mr. Justice McReynolds is not far behind them.[61] The conflict between the ideas of the conservatives and those of such a jurist as Mr. Justice Holmes, who held that the Fourteenth Amendment should not be used "beyond the absolute compulsion of its words to prevent the making of social experiments" by the States,[62] is essentially the same as the conflict between the ideas of Marshall and those of Taney.

[60] *Fletcher v. Peck*, 6 Cranch, 135.

[61] R. A. Brown, "Police Power—Legislation for Health and Personal Safety," *Harvard Law Review*, XLII (1929), 868.

[62] Dissenting opinion in *Truax v. Corrigan*, 257 U. S. 344 (1921).

VIII

SLAVERY

Taney's Personal Viewpoint

THE CASUAL student of history always thinks of Taney in connection with the Dred Scott Case. His opinion in that celebrated case not only aroused the bitter hostility of the anti-slavery forces of his time, but it has been written up in the histories in such a way that it leaves the reader with the impression that Taney was a judicial leader of the pro-slavery forces.[1] A number of factors contribute to the explanation of the Court's action in the case. One who is interested in Taney's part in it must examine evidence of different kinds. Taney's personal attitude toward slaves and slavery is important, for whether for good or evil, judges, like the rest of us, are influenced by personal attitudes and by their own backgrounds. Taney's other cases involving slavery questions must be examined for light that they may throw on his theory of slavery. The political conditions of the time when the Dred Scott Case was decided must also be taken into consideration.

As we have already noticed, Taney grew up on a slave tended plantation in Maryland. In time he inherited some of the family's slaves, but these he soon set free. In 1857 he wrote:

I am not a slaveholder. More than thirty years ago I manumitted every slave I ever owned, except two, who were too old, when they became my property, to provide for themselves. These two I supported in comfort as long as they lived. And I am glad to say that none of those whom I manumitted disappointed my expecta-

[1] See T. C. Smith, *Parties and Slavery*, p. 199; H. W. Elson, *History of the United States of America*, IV, 47-49; D. S. Muzzey, *The American Adventure*, I, 502; J. Schouler, *History of the United States of America*, V, 378-81.

tions, but have shown by their conduc [sic] that they were worthy of freedom; and knew how to use it.[2]

Taney's personal kindness to Negroes with whom he came in contact is illustrated by two incidents: One in which he helped a little child, and the other in which he showed his affection for two old people who had been his faithful servants for a long time. Tyler relates that, while Taney was Attorney General of the United States, one cold morning as he was hurrying to his office he saw a little Negro girl trying vainly to pump some water into her pail. When the Attorney General saw the little girl shivering in the wind he pumped her water for her, put the bucket on her head, and said, "Tell whoever sent you to the pump, that it is too cold a morning to send out such a little girl."[3] The other incident referred to took place many years later. In 1860 Taney had some large-sized photographs of himself taken. He ordered two of them put into gilt frames, one for his old Negro manservant, and the other for his old Negro servant-woman. These pictures were presented, as Taney wrote at the bottom of each, "as a mark of my esteem," and signed "R. B. Taney."[4] In such incidents one sees the influence of Monica Taney.

On one occasion Taney is reported to have said to an acquaintance, "Thank God that at least in one place all men are equal, in the church of God. I do not consider it any degradation to kneel side by side with a negro in the house of our Heavenly Father."[5]

In 1819 Taney, then practicing law in Frederick, defended Reverend Jacob Gruber, Methodist Abolitionist who had strongly condemned slavery to a camp meeting audience

[2] To Samuel Nott, August 19, 1857, *Proceedings of the Massachusetts Historical Society*, XII, 447.

[3] Tyler, *op. cit.*, p. 190.

[4] E. S. Taney, "Roger B. Taney," *The Green Bag*, VII (1895), 362.

[5] J. A. Walter, in a letter to *The Century Magazine*, IV (1883), 958.

composed both of slave owners and slaves, and had been indicted for seeking to incite slaves to rebellion.[6] The fact that Taney was attorney for an Abolitionist does not, in itself, indicate anything about his personal attitude toward slavery.[7] However, in his plea to the jury in this case Taney used language which seems to reveal his own opinions on the subject.

After defending Reverend Gruber's right to free speech Taney said:

Mr. Gruber feels that it is due to his own character, to the station which he fills . . . not only to defend himself from this prosecution, but also to avow, and to vindicate here, the principles which he maintained in his sermon. There is no law which forbids us to speak of slavery as we think of it. . . . He did rebuke those masters, who, in the exercise of power, are deaf to the calls of humanity; and he warned them of the evils they might bring upon themselves. He did speak with abhorrence of those reptiles who live by trading in human flesh, and enrich themselves by tearing the husband from the wife, the infant from the bosom of the mother; and this, I am instructed, was the head and front of his offending. Shall I content myself with saying he had a right to say this? that there is no law to punish him? So far is he from being the object of punishment in any form of proceeding, that we are prepared to maintain the same principles, and to use, if necessary, the same language here, in the temple of justice and in the presence of those who are the ministers of the law. A hard

[6] Tyler, *op. cit.*, pp. 123-27.

[7] Gustavus Myers, Socialist historian of the Supreme Court, condemns Taney for his work as attorney for John Gooding, an alleged slave-trader, in *United States v. Gooding*, 12 Wheaton, 460 (1827). Gooding's attorneys successfully based the defense largely on technicalities. Myers says Taney's part in this case won the high regard of the slave owners, and was one thing that "caused them to push him forward later for Attorney-General of the United States, Secretary of the Treasury, and then for the Chief Justiceship of the Supreme Court of the United States." G. Myers, *History of the Supreme Court of the United States*, p. 365. Taney's work in this case is offset by the fact that in 1809 he tried to secure the freedom of a negro accused of the rape of a white girl, largely on technicalities. *Burke v. State*, 2 Harris & Johnson, 426 (Md.). See Steiner, *op. cit.*, pp. 65-66. As a matter of fact neither case indicates anything about Taney's own views on slavery. He was merely serving as a lawyer for the defense in both instances.

necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet, while it continues, it is a blot on our national character; and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away, and earnestly looks for the means by which this necessary object may be best attained.[8]

Years later, in 1857, Taney wrote a letter to Reverend Samuel Nott, who had written a pamphlet on slavery, which reveals something of his attitude at that time. It should be kept in mind that this letter was written when the controversy over the slavery question was at its height. Opinions on the subject of slavery had changed much in both North and South since 1819. Fire eaters in both sections were busily stirring in the caldron that was soon to boil over in war. In his letter Taney takes a realistic view of the problems that faced the southern slave owner.

He said, "Every intelligent person whose life has been passed in a slaveholding State, and who has carefully observed the character and capacity of the African race, will see that a general and sudden emancipation would be absolute ruin to the negroes, as well as to the white population." He asserts that Maryland and Virginia have given every facility for the emancipation of Negroes of an age and condition of health to support themselves, and that manumissions were numerous before "the present excitement." "And in the greater number of cases that have come under my observation, freedom has been a serious misfortune to the manumitted slave; and he has most commonly brought upon himself privations and sufferings which he would not have been called on to endure in a state of slavery. In many cases, however, it has undoubtedly promoted his happiness."[9]

[8] Tyler, *op. cit.*, pp. 129-31.

[9] Taney to Nott, August 19, 1857, *Proceedings of the Massachusetts Historical Society*, XII, 445.

Then he goes on to discuss the duty of the master toward his slaves saying,

Unquestionably it is the duty of every master to watch over the religious and moral culture of his slaves, and to give them every comfort and privilege that is not incompatible with the continued existence of the relations between them. And so far as my knowledge extends, this duty is faithfully performed by the great body of hereditary slaveholders in Maryland and Virginia. . . . And I know it has been the desire of the statesmen of Maryland to secure to the slave every protection from maltreatment by the master that can with safety be given, and without impairing that degree of authority which is essential to the interest and well being of both. But this question is a very delicate one, and must at all times be approached with the utmost caution. The safe and true line must always depend upon existing circumstances, and they must be thoroughly inquired into and understood before there can be any safe or useful legislation in a State.[10]

Attempts of the South to better the condition of the Negroes by humane and intelligent legislation had been slowed up by the agitation of the Abolitionists. Taney says,

The pains which have unhappily been taken for some years past to produce discontent and ill-feeling in the subject race, has rendered any movement in that direction still more difficult. For it has naturally made the master more sensitive and jealous of any new restriction upon the power he has heretofore exercised and which he has been accustomed to think essential to the maintenance of his authority as master. And he also feels that any step in that direction at the present time might injuriously affect the minds of the slaves. They are for the most part weak, credulous, and easily misled by stronger minds.[11]

This was a good presentation of conditions as they existed among the slaveholders of the upper South. It came from the pen of a Southerner who had grown up in the midst of slavery and who, believing slavery wrong, had freed the

[10] *Ibid.*, p. 446. [11] *Ibid.*

slaves which he inherited. It was typical of the opinion of many Southern gentlemen, although the number of those who thought slavery wrong had decreased almost as fast as radical Abolitionism had increased. The viewpoint of such men was naturally different from that of the Northern Abolitionists who also believed slavery wrong, but had had no experience with it, except perhaps to see an escaped slave in chains being taken back to servitude.

Taney's views are very similar to those expressed earlier by Thomas Jefferson. Jefferson was one of the leading spokesmen of Southern anti-slavery sentiment in the generation just preceding Taney's. In 1814 Jefferson wrote, referring to Negro slaves, "My opinion has ever been that, until more can be done for them, we should endeavor, with those whom fortune has thrown on our hands, to feed and clothe them well, protect them from all ill usage, require such reasonable labor only as is performed voluntarily by freemen, & be led by no repugnancies to abdicate them, and our duties to them. The laws do not permit us to turn them loose, if that were for their good: and to commute them for other property is to commit them to those whose usage of them we cannot control."[12] Jefferson thought that emancipation would come eventually, either by voluntary action of the slave owners or as a result of armed force.[13] He favored freeing all slaves born after a certain date, and sending them, furnished with farming implements and domestic animals, to St. Domingo or some such place.[14] But the whole problem of slavery seemed to him very difficult of solution. In 1820 he wrote, "But as it is, we have the wolf by the ears, and we

[12] To Edward Coles, August 25, 1814, *The Writings of Thomas Jefferson*, IX, 479.

[13] *Ibid.*, 478.

[14] "Notes on Virginia," *ibid.*, III, 243-44; to Albert Gallatin, December 26, 1820, *ibid.*, X, 178.

can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other."[15]

The bitter fight over the admission of Missouri to the Union alarmed Jefferson. He said, "But this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence."[16] It seemed to him that the question involved was not a moral question but merely one of power.[17] Like Taney he believed slavery wrong and favored gradual emancipation. Also like Taney, he deplored the bitter struggle over the question of slavery in the Territories and feared for its effect on the permanence of the Union.

The Legal Status of Slavery

Taney's official opinions as Attorney General of the United States and his decisions as Chief Justice of the Supreme Court, other than the Dred Scott decision, taken as a whole do not show any bias either for or against slavery. Questions involving slavery were decided as legal questions, according to Taney's general principles of government. They were in harmony with his decisions on other matters involving the same principles. This is especially noticeable in the cases involving the power of the States to deal with slavery. In some slavery cases of a different nature there is not so much opportunity for comparison with non-slavery cases. In all of them, Taney's decisions seem to have been a reasonable application of the laws of the time.

Early in his official career he was twice required to pass on the status of slaves taken out of the United States and later brought back. At that time there was a federal law in force against the importation of slaves into the United States. In

[15] To John Holmes, April 22, 1820, *ibid.*, pp. 157-58.

[16] *Ibid.*, p. 157.

[17] To LaFayette, December 26, 1820, *ibid.*, p. 180.

1831, while he was Attorney General, Taney was asked for an opinion as to whether a prosecution would lie in the federal courts against certain citizens who had moved to Texas (then owned by Mexico) and, before becoming Mexican citizens, had returned to the United States bringing back with them the slaves which they had taken when they went to Mexico. His opinion was that the right to bring back the slaves did not depend upon the length of time that the parties had remained in Texas. If they had moved there with a view to permanent residence the slaves could not lawfully be brought back into the United States, but if the removal to Texas was only for a temporary purpose, and the owners had intended to return in a short while, the slaves might safely be brought back.[18]

During his first term as Chief Justice a case involving a similar question came before the Supreme Court.[19] An American woman had visited France, taking her Negro maid with her. When she returned to the United States she brought the girl back with her. The ship on which she arrived was libelled in the district court, charged with the importation of a slave. Taney held that there was nothing in the law to prevent the woman from bringing her slave back with her. The law against importing slaves, he said, was obviously directed against Negroes who were inhabitants of foreign countries. It could not be applied to colored persons domiciled in the United States and brought back after a temporary absence. "In the case before the court, although the girl had been staying for a time in France, in the service of her mistress; yet in construction of law, she continued an inhabitant of Louisiana. . . ."[20]

Only a few years later Taney had two opportunities to

[18] *Official Opinions of the Attorneys General*, II, 479-80.

[19] *The Garonne* (United States v. Garonne) 11 Peters, 73 (1837).

[20] *Ibid.*, pp. 77, 78.

pass on cases involving alleged violations of the law against the slave trade. In both cases he decided against the slave trader. While he was on circuit a case came before him involving a ship built for the slave trade. He said, "The fair construction of the act of congress is: That where the criminal purpose is proved to exist in the owner, or in the factor or master, who has the direction of the vessel at the time she is built or fitted out, the forfeiture attaches. . . ."[21] The ship was condemned. In the same year he wrote the decision of the Supreme Court in the case of the *United States v. Morris*,[22] holding that a vessel equipped for the slave trade and on its way to Africa to get slaves was engaged in the trade, even though no slaves had as yet been taken aboard.

The questions just considered involve aspects of slavery which do not touch directly on the institution as it existed within the United States. His decisions in these cases could have met with no reasonable objection, either from pro-slavery people or from the anti-slavery group. As we have already suggested they reveal little of Taney's personal attitude, but simply show that he was judicial in his treatment of the questions considered. It might be well in this connection, however, to recall that Taney in 1821, as a member of the Maryland Senate had voted against the repeal of the law prohibiting the importation of slaves into Maryland.[23]

Taney regarded slavery in the United States as a matter for the States to regulate, protect, or abolish, as they saw fit. In 1831, as Attorney General, he upheld the right of a State to set slaves free as soon as they were brought within its boundaries. He thought that the federal government could not interfere with that right. The master's right of property must depend upon the laws of the State.[24] Later as Chief

[21] Campbell's Reports, p. 417 (1840).

[22] 14 Peters, 464 (1840).

[23] *Votes and Proceedings of the Senate of Maryland*, January 10, 1821, p. 19.

[24] *Official Opinions of the Attorneys General*, II, 475-77.

Justice of the Supreme Court he wrote a number of decisions in which he treated slavery as a matter primarily of State concern. When a slave claimed freedom on the ground that his former owner had provided in her will that he should become free if sold or taken out of the State, and that he had been sold by the person who inherited him, Taney freed the slave. In so doing he simply applied the State law.[25] In the case of *Strader et al. v. Graham*[26] the status of Kentucky slaves who had from time to time been taken across the border into Ohio for employment as musicians was in question. Taney said,

> Every state has an undoubted right to determine the *status* . . . of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio. . . . The Court of Appeals have determined, that by the laws of the state they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.[27]

As Attorney General Taney had asserted his belief that the federal government could not in the exercise of its treaty making power interfere with the right of a State to deal with slavery as it saw fit.[28] In 1841, in a concurring opinion in the case of *Groves v. Slaughter*[29] he held that the federal government could not interfere with slavery in the States by its

[25] *Williams v. Ash*, 1 Howard, 1 (1843).
[26] 10 Howard, 82 (1850).
[27] *Ibid.*, 93, 94.
[28] *Official Opinions of the Attorneys General*, II, 476.
[29] 15 Peters, 449.

commerce power. In regard to the power of the federal government to regulate the slave trade between the States, he said,

> In my judgment, the power over this subject is exclusively with the several states; and each of them has a right to decide for itself, whether it will, or will not, allow persons of this description to be brought within its limits, from another state, either for sale, or for any other purpose; and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories: and the action of the several states upon this subject cannot be controlled by congress, either by virtue of its power to regulate commerce, or by virtue of any power conferred by the constitution of the United States.[30]

In 1860, a Kentucky grand jury indicted a free Negro for helping a slave to escape. The accused had fled to Ohio, so the governor of that State was requested to arrest him and turn him over to the Kentucky authorities. This he refused to do. The State of Kentucky moved for a writ of mandamus from the Supreme Court commanding the governor of Ohio to surrender the fugitive.[31] Taney, delivering the decision of the Court, held that under the interstate rendition clause of the Constitution it was plainly the duty of the governor to deliver the fugitive to Kentucky, but there was no constitutional method by which he could be compelled to do it. He said, "And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever. . . ."[32] Such a power, he thought, would be inconsistent with the nature of the Union and incompatible with the dignity of the States.

Thus far Taney's slavery decisions are State's rights decisions. In harmony with his police power decisions, he gives

[30] *Ibid.*, 508.

[31] *Kentucky v. Dennison*, 24 Howard, 66 (1860).

[32] *Ibid.*, 107.

to the States complete power to deal with the subject, except as it may be limited by specific constitutional provisions. However the Constitution contains one limitation on the power of the States to settle the status of slaves for themselves. It says "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[33] This was early, and generally, construed to give Congress power to provide for the return of fugitive slaves.[34] Accepting this view Taney, also in harmony with his decisions involving other matters, held that the power of the national government on the subject was supreme and could not be interfered with.

In 1842, in the case of *Prigg v. Pennsylvania*,[35] Mr. Justice Story delivering the Supreme Court's decision held unconstitutional a Pennsylvania law interfering with the return of fugitive slaves. He not only held the State law unconstitutional, but also declared that the power of enacting legislation providing for the return of fugitive slaves belonged exclusively to the national government. Chief Justice Taney concurred with the decision holding the Pennsylvania law contrary to the Constitution, but he dissented from the opinion that the power to legislate on the subject was exclusive in the national government. He thought the States were not prohibited from helping the owner to regain possession of his property if found in their territory, and in fact it was their

[33] Article 4, Sec. 2, paragraph 3.

[34] The first fugitive slave law was passed in February, 1793. It gave jurisdiction to federal courts, and provided a fine of $500 for anyone obstructing the return of a fugitive slave. It passed the House of Representatives by a vote of 48 to 7. *Annals of the Congress of the United States,* Second Congress, 1791-1793, pp. 861, 1414-15.

[35] 16 Peters, 539.

duty to do so. The Constitution "contains no words prohibiting the several states from passing laws to enforce this right."[36] The words of the article would seem to make it the duty of the several States to pass laws to carry into execution the compact into which they solemnly entered with each other.

> The constitution of the United States . . . is a part of the law of every state in the Union; and is the paramount law. The right of the master, therefore, to seize his fugitive slave, is the law of each state; and no state has the power to abrogate or alter it. And why may not a state protect a right of property, acknowledged by its paramount law? Besides, the laws of the different states, in all other cases, constantly protect the citizens of other states in their rights of property, when it is found within their respective territories; and no one doubts their power to do so. And in the absence of any express prohibition, I perceive no reason for establishing, by implication, a different rule in this instance. . . .[37]

In the case of *Ableman v. Booth*[38] Taney had a chance to pass on the constitutionality of the fugitive slave law of 1850. Speaking for a unanimous court he held the law constitutional. However, the main issue involved was not the constitutionality of the law. The Supreme Court of Wisconsin had ordered a federal prisoner in the State set free on the ground that the law was contrary to the Constitution. In a ringing decision notable for its nationalistic tone, Taney denied the right of a State to interfere with the process of the federal courts. Within its delegated sphere of power the national government must be supreme, and free from interference.

[36] *Ibid.*, 627.

[37] *Ibid.*, 627. This is in harmony with his decision in the *License Cases*, 5 Howard, 573 (1846). In that decision, speaking of the commerce power, he said, ". . . the mere grant of power to the general government cannot . . . be construed to be an absolute prohibition to the exercise of any power over the same subject by the States." P. 579.

[38] 21 Howard, 506 (1858).

We have seen that Taney regarded slavery as an evil institution, but one which would have to be abolished gradually. His attitude toward slavery as it touched the law should also be fairly clear after an examination of the opinions and decisions discussed in this chapter. As it existed, or was prohibited, within a State, slavery was wholly a matter for each State to deal with as it saw fit. The national government had no constitutional power to interfere in any way. As to slaves who fled to free States, the Constitution had authorized the national government to aid the owner in their capture and return. In the exercise of this power the national government could not constitutionally be hindered in any way by State legislation. In the exercise of their reserved powers the States were sovereign; in the exercise of its delegated powers the United States was sovereign. The Constitution was the supreme law of the land. Its division of powers must be scrupulously respected.

IX

THE DRED SCOTT CASE

Taney's Opinion

In 1857 the Supreme Court delivered its decision in the case of *Dred Scott v. Sandford*[1] holding that Dred Scott was a slave, that he was not a citizen of the United States, that a Negro could not be made a citizen, and that the national government had no power to prohibit slavery in the Territories. From the standpoint of technique in interpreting the Constitution as it was written, Taney's opinion in this case is one of the best that he ever wrote. To him the task at hand was simply to ascertain accurately the sovereign will as written into the Constitution. In order to do that he made a painstaking study of the conditions in America and in Europe not only at the time when the Constitution was written but before. Then he examined the laws of the States and the national government which would serve as an indication of the legislative interpretation of the Constitution after it was written. His decision of the questions involved in the case was based on this thoroughgoing historical interpretation of the Constitution.

Regardless of the soundness or unsoundness of Taney's interpretations, it seems to us now as we look back that his opinion was a blunder in statecraft. Designed to allay the conflict between North and South, the decision only embittered it, and brought the Supreme Court into disrepute in the dominant section of the country. In this, the only instance in which the Taney Court held an act of Congress unconstitutional, the Court almost seemed to go out of its way to perpetuate the inferior status of Negroes. In order to under-

[1] 19 Howard, 393.

stand why Chief Justice Taney, a Jacksonian democrat with a passionate regard for the interests of the common people, a personal distaste for slavery, and a consistent record of liberalism, should have been a party to such a decision one has to go back to the history of the period.

The Historical Background of the Decision

The Dred Scott decision was delivered at a time when the atmosphere between North and South was dangerously tense. Newspapers were stirring up the people, Senators and Representatives with tempers worn raw were talking openly on the floors of Congress of the possibility of Civil War. Affairs in Kansas were the immediate irritant. Slavery and anti-slavery forces were engaged in a desperate struggle over the Territory. In Kansas itself Northern partisans were shooting, and being shot by, Southern partisans.

Ever since the historic debates over the admission of Missouri in 1820 the question of slavery in the Territories and the admission of new States had been full of dynamite. The struggle over Missouri had led men to talk of the possibility of disunion.[2] Jefferson, as we have noted was one of those who was alarmed for the safety of the Union. In 1850, another crisis came, to be met with the temporary solution of the Compromise of 1850. Then came the Kansas question and the flames were fanned again. Each time the question of slavery in the Territories and the new States came up, it brought the country closer to disunion, for the divergence between the two sections continued to grow wider, and the possibility of compromise more difficult of achievement.

The Kansas question with all its dangerous implications was thrust into the presidential campaign of 1856 because the leaders of the newly formed Republican party, regarding it as a vote-getting issue in the North, refused to compromise

[2] F. J. Turner, *Rise of the New West*, p. 169.

on the question before Congress adjourned in the summer of that year.[3] The Democratic leaders, anxious to keep the question out of the campaign, declared that it might lead to Civil War. Senator Crittenden of Kentucky said,

> Do we not hear of preparations all around for feeding this little civil war in Kansas, sustaining it with money, supplying the parties with arms, and furnishing men to carry it on? . . . Sir, this is the temper existing in the country at this time, and it tends greatly to increase apprehension, that while this policy is pursued merely for the purpose of carrying an election, it may collaterally have the fatal effect of stirring up civil war in the land. That once done in Kansas . . . one single spark may light up the whole atmosphere, and it may spread through this broad land.[4]

Senator Seward of New York replied, "Sir, it is not the character of the north star to change." And referring to the North of the United States, he continued, "You may resist if you will, but it will persevere peacefully, if you will suffer it to do so; but it will persevere constantly, nevertheless, in the extension of freedom in the Territories of the United States, and by its example in inducing the southern States to abolish slavery among themselves."[5]

The Republicans made "bleeding Kansas" their chief campaign issue. They resolved in their platform, "That the Constitution confers upon Congress sovereign power over the Territories of the United States, for their government, and that in the exercise of this power it is both the right and duty of Congress to prohibit in the Territories those twin relics of barbarism, polygamy and slavery."[6]

When the Democrats won the election there was a wide-

[3] Smith, *op. cit.*, p. 161.

[4] *Congressional Globe*, 34th Cong., 1st sess., pt. 2, August 28, 1856, pp. 58-59. See also remarks by Senator Benjamin, August 27, 1856, p. 46, and by Senator Bell, August 29, 1856, p. 71.

[5] *Ibid.*, August 28, 1856, p. 61.

[6] W. S. Myers, *The Republican Party*, p. 67.

spread feeling that disruption of the Union had been narrowly averted. In his last Annual Message to Congress[7] President Pierce expressed his gratitude at the defeat of a party whose victory would have meant disunion. The people, he thought, had sustained the Constitution and rebuked sectionalism. Referring to the anti-slavery agitation he said:

> . . . associations have been formed in some of the States of individuals who, pretending to seek only to prevent the spread of the institution of slavery into the present or future inchoate States of the Union, are really inflamed with desire to change the domestic institutions of existing States. . . . They are perfectly aware that the change in the relative condition of the white and black races in the slaveholding States which they would promote is beyond their lawful authority . . . the only path to its accomplishment is through burning cities, and ravaged fields, and slaughtered populations . . . and that the first step in the attempt is the forcible disruption of a country . . . transforming the now peaceful and felicitous brotherhood into a vast permanent camp of armed men like the rival monarchies of Europe and Asia.[8]

This message started bitter argument in the Senate. Senator Trumbull of Illinois criticized the President because at one point in his message he had asserted that the Missouri Compromise was unconstitutional. The Senator declared that the Supreme Court had said in so many words, in the case of *American Insurance Company v. Canter*,[9] "that in regard to the Territories of the United States Congress possesses all the powers both of the Federal and State Governments as to a State."[10] This, he said, meant that Congress had power to keep slavery out of the Territories.[11]

The Southerners were afraid that the agitation against

[7] Richardson, V, 397-417. The message was read to Congress December 2, 1856.

[8] *Ibid.*, 398-99.

[9] 1 Peters, 546 (1828).

[10] *Congressional Globe*, 34th Cong., 3rd sess., December 2, 1856, p. 15.

[11] *Ibid.*, pp. 15-16.

slavery in the Territories was merely the beginning of an attempt at the eventual abolition of slavery in the southern States,[12] an attempt that could lead only to disunion. Senator Mason of Virginia was inspired with hope because in the election some of the northern States had united with the South "in keeping out of power a party whose success must necessarily have torn this Union into fragments."[13] A Senator from Alabama said, "They say they wish not to interfere with slavery in the States! . . . That may be true; but if agitation in regard to slavery in the Territories is to be carried on in these Halls for the purpose of destroying the peace and quiet of the country, they know the ultimate design is to affect this Government and this Union."[14]

Such was the setting when Dred Scott asked for his freedom, raising in his plea the question of the status of slavery in the Territories. The lawyers of this obscure Missouri Negro raised questions which agitated again the issues which had brought on a national crisis. The case required cautious handling if it was not to widen the breach between the opposing sections. It required almost superhuman wisdom—more than the Court had.

The Facts in the Case

The facts in the case were as follows:[15] In 1834, Dred Scott was a slave belonging to Dr. Emerson, a surgeon in the United States army. In that year Dr. Emerson took him from Missouri to the military post at Rock Island, Illinois, and held him there as a slave until the spring of 1836. Then he took him to a military post in the Louisiana Territory north of 36° 30′ and held him in slavery until 1838. In 1838 Dr. Emerson brought Scott back to Missouri. Before

[12] See remarks of Senator Brown of Mississippi, December 2, 1856, pp. 11-12, 14-15.

[13] *Ibid.*, December 2, p. 13.

[14] *Ibid.*, December 4, 1856, p. 24 (Senator Fitzpatrick).

[15] *Dred Scott v. Sandford*, 19 Howard, 397-98 (Dec. term 1856).

the commencement of the suit Scott was sold to John F. A. Sandford. Scott first brought suit for his freedom in a State court in Missouri. When the case reached the State supreme court they held that he was not entitled to freedom. His attorneys then brought a suit for his freedom in the United States Circuit Court, and the case came from that court to the Supreme Court of the United States.

The case was first argued before the Supreme Court in the spring of 1856. At that time the justices disagreed as to whether the question of Dred Scott's eligibility to sue in a federal court was involved. The case was reargued at the next term and the majority at that time decided that the question was not before them for consideration. The justices also discussed in conference the question as to whether or not the plaintiff's residence in territory north of 36° 30′, supposedly closed to slavery by the Missouri Compromise, had liberated him. They decided that this act of Congress did not liberate Dred Scott under the particular circumstances, and also that it was inoperative to free a slave in any case. The majority decided that the Court's decision should be limited to the particular circumstances of Dred Scott's case. The question of the constitutionality of the Missouri Compromise provision for the abolition of slavery in the northern Territory was to be left untouched. Mr. Justice Nelson was selected to write the Court's opinion.[16] Unfortunately, this decision was not adhered to.

Mr. Justice McLean let his colleagues know that he was going to write a long dissent giving his opinion and arguments on the Missouri Compromise and the right of a Negro to sue in the federal courts.[17] Justice McLean wanted to be

[16] Justice Campbell to S. Tyler, 1870, Tyler, *op. cit.*, pp. 382-84. Justice Grier to Buchanan February 23, 1857, *The Works of James Buchanan*, edited by J. B. Moore, X, 106-8 note.

[17] See Justice Grier's letter to Buchanan, February 23, 1857, *The Works of James Buchanan*, X, 107 note.

president of the United States. It is said that a man who is once stung by the presidential bee never wholly recovers. This would seem to have been true in the case of McLean. He had been in a receptive mood since 1833.[18] He tried unsuccessfully to get the Republican nomination in 1856.[19] He was to try again in 1860.[20] His action in the Dred Scott case may be taken as that of a candidate for the Republican nomination.

McLean's proposed action, and the fact that Justice Curtis also proposed to write a far-flung dissent, caused the majority to change their minds as to the nature of their decision. They decided to embody in it a discussion of all the questions involved in the case, including the question of the constitutionality of a congressional prohibition of slavery in the Territories, and Chief Justice Taney was delegated to write the opinion.[21]

The Question of Jurisdiction

In his opinion he first considered the question of whether the federal courts had jurisdiction over the case. In this connection he discussed exhaustively the nature of American citizenship and how it is obtained. He then examined the facts in the case to see if they entitled Scott to freedom, coming to the conclusion that neither his stay in the northern Territory nor his residence in Illinois had made him free.

In discussing the question of jurisdiction, Taney pointed out that the federal courts of the United States do not, as do

[18] Ambrose Spencer wrote to Henry Clay, December 14, 1833, "From present appearances the contest on the part of our adversaries will be between Van Buren, Judge M'Lean, and Mr. Cass. . . . M'Lean's judicial course has been jesuitical and trimming, and it will be a strong objection to him that he enters the arena with the robes of office on." *The Private Correspondence of Henry Clay*, edited by Calvin Colton, p. 372.

[19] W. S. Myers, *op. cit.*, pp. 64-65.

[20] C. A. and M. R. Beard, *The Rise of American Civilization*, II, 19.

[21] Justice Campbell to Tyler, 1870, Tyler, *op. cit.*, p. 384; Justice Grier to Buchanan, February 23, 1857, *The Works of James Buchanan*, X, 107.

English and American State courts, presume that they have jurisdiction over cases brought before them. The cases in which they have jurisdiction are specified, and when a person brings suit he must show that his suit is within the jurisdiction of the court. If he seeks to bring suit in a federal court on the ground that he and the defendant are citizens of different States, he must show that such is the case.[22]

Citizenship in the United States

This brought Taney to the question of Dred Scott's citizenship. As he saw it the question was simply, could a Negro whose ancestors had been slaves become an American citizen? Taney thought he could not. It seemed to him that such persons were not meant to be included under the word "citizen" as it was used in the Constitution. At the time the Constitution was made they were considered an inferior class of beings who, whether emancipated or not, had only the rights and privileges which those who held the power might choose to give them. Whether this was just or unjust, said Taney, was not a matter for the Court to deal with. Their business was to apply the Constitution.[23]

Continuing the discussion of the subject he said that if Negroes were recognized as citizens at the time the Constitution was adopted they would become members of the new sovereignty created by it.[24] In the opinion of the Court the legislation and history of the times showed that neither the Negroes who had been imported as slaves nor their descendants, whether they became free or not, were then regarded as part of "the people." Neither was the language of the Declaration of Independence meant to apply to them. Their status in the period when the Declaration of Independence and the Constitution were written was convincing evidence of that. Taney painted a vivid picture of it.

[22] *Dred Scott v. Sandford,* 19 Howard, 401-2.

[23] *Ibid.,* 404-5.

[24] *Ibid.,* 406.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[25]

Taney said that this view of the status of Negroes was impressed upon the colonies by England. As evidence that it was the view of the colonists, he cited laws against intermarriage between whites and blacks in Maryland and Massachusetts at the time of the American Revolution. To him these laws showed "that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery . . . and which they looked upon as so far below them . . . that intermarriages . . . were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage." And no distinction was made between free Negroes and slaves "but this stigma, of the deepest degradation, was fixed upon the whole race."[26]

That the States did not consider Negroes citizens after the Union was formed was evidenced by their court decisions and by the acts of their legislatures. In 1822, the Court of Appeals of Kentucky decided that free Negroes were not citizens within the meaning of the Constitution of the United States.[27] Courts in Tennessee and Connecticut announced the same doctrine.[28] Laws discriminating against Negroes were

[25] *Ibid.*, 407.
[26] *Ibid.*, 409.
[27] *Ibid.*, 413.
[28] *Ibid.*, 413-15.

in force in Massachusetts, Connecticut, New Hampshire, and Rhode Island.[29] Even the national government had discriminated against them in the charter of the District of Columbia as late as 1820.[30] To Taney it seemed that persons so discriminated against could not have been regarded as members of the sovereign body politic, and he said:

> The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the constitution was adopted, and long afterwards . . . and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion.[31]

Taney thought that Negroes could never be made citizens under the Constitution as it stood. They could not be made citizens either by the States or the national government. A State might give an individual all the rights and privileges of citizenship within its own boundaries but "he would not be a citizen in the sense in which that word is used in the constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States."[32] The power of naturalizing foreigners belongs exclusively to the national government but, said

[29] *Ibid.*, 413-16.
[30] *Ibid.*, 421.
[31] *Ibid.*, 416.
[32] *Ibid.*, 405.

Taney, "It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class."[33] The States had surrendered the power to admit new members into the sovereignty, and the national government had been given power to admit only aliens. Emancipated Negroes were thus condemned to stand outside the pale, as long as the Constitution remained unchanged.

Slavery in the Territories

The question of Dred Scott's right to sue was raised in a plea in abatement. There was doubt in the minds of some of the justices as to whether the question was legally before the Court. After he had decided that Scott was not a citizen of Missouri, and hence not entitled to sue in the federal courts on the basis of his citizenship, Taney said, "but if that plea is regarded as waived, or out of the case . . . yet the question as to the jurisdiction of the circuit court is presented on the face of the bill of exception itself. . . ."[34] He then proceeded to discuss the facts of the case, considering first the effect of Dred Scott's stay in the Louisiana Territory north of thirty-six degrees and thirty minutes on his status as a slave.

The main question in this connection was the constitutionality of the act of Congress which had prohibited slavery in the Louisiana Territory north of thirty-six degrees and thirty minutes north latitude. This provision had been embodied in what is generally known as the Missouri Compromise.

Dred Scott's attorneys had claimed that Congress had power to abolish slavery in the Territories because of the article in the Constitution which confers on Congress power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the

[33] *Ibid.*, 417. [34] *Ibid.*, 427.

United States."[35] In the judgment of the Court, said Taney, "that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more."[36] In order to establish this interpretation Taney discussed the history of the period when the article was written, the wording of the article, and a previous decision of the Supreme Court.[37]

His argument is ingenious, and perhaps convincing, if one assumes that the Fathers did not consider the possibility that the United States might acquire more territory. This is not an altogether unreasonable assumption, but to base on it an interpretation of a clause in the Constitution such as the one under consideration seems to be carrying the principle of strict construction rather far.

It would have seemed consistent with this interpretation to decide that the Constitution did not authorize the federal government to acquire new territory, but Taney did not go that far. He said, "The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission."[38]

He thought that the power to acquire new territory was necessarily accompanied by the power to govern it. Hence

[35] Art. 4, Sec. 3, Paragraph 2.
[36] 19 Howard, 432.
[37] *Ibid.*, 432-46.
[38] *Ibid.*, 447.

Congress could establish whatever government it considered best for such territory, to preserve it until it was ready for statehood.[39] But the power of Congress over the person and property of citizens in the territory was not discretionary.[40] All the constitutional guarantees of private rights applied there just as fully as in the States. Congress could not abridge freedom of religion, of speech, or of the press, nor deny to the people the right to bear arms or to trial by jury, nor in any other way assume power denied to it, or not given, by the Constitution. One of the constitutional safeguards of individual rights was the provision of the fifth amendment that no person should be deprived of life, liberty, and property, without due process of law. This particular provision it seemed to him, would prevent Congress from prohibiting slavery in the Territories. He said, "and an act of congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law."[41]

The Constitutional Status of Property in Slaves

It had been assumed by some that property in a slave was different from other property. It seemed to Taney an assumption without legal justification. The Constitution was the supreme law for the United States. The government of the United States was established, and certain rights of its citizens were guaranteed, by it. The government could not go beyond the power granted to it by the Constitution. No law of nations or reasoning of jurists on slavery or any other subject could add to the powers of the American government or take from the citizens the rights they had reserved. "And if the constitution recognizes the right of property of the

[39] *Ibid.*, 448-49. [40] *Ibid.*, 449. [41] *Ibid.*, 450.

master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the government."[42]

The Constitution, he pointed out, specifically recognized the right of property in a slave. "The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. . . . And no word can be found in the constitution which gives congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description."[43]

State Laws and Slavery

Having established the fact that Congress had no constitutional power to prohibit slavery in the Territories because such a prohibition would constitute a taking of private property without due process of law, Taney proceeded to consider the question as to whether or not Dred Scott's stay in Illinois, a free State, established his freedom.

The latter question did not require much discussion. The principle had been established in *Strader et al. v. Graham*[44] where slaves had been taken from Kentucky into Ohio and back again, that the status of the slave depended on the law of the State that he was in. In the present case Dred Scott's status in Missouri depended on Missouri law, and not on the law of Illinois. The Supreme Court of Missouri had decided

[42] *Ibid.*, 451. [43] *Ibid.*, 451, 452. [44] 10 Howard, 82 (1850).

that he was a slave, and that decision was authoritative in deciding what was the law of the State.[45]

Taney decided three things in his opinion: A Negro descendant of slaves could never become a citizen; Congress had no power to prohibit slavery in the Territories; and a slave taken into a free State for a temporary sojourn is not necessarily freed as a result, since his status depends on the law of the State that he is in. The latter point had been established in a previous case, and could meet with little objection. The two other principles announced were not only new so far as decisions of the Supreme Court were concerned, but they were also more open to objection. The fact that decision of these issues could have been avoided in this case lent strength to the objections. It was not necessary for the Court to decide that Negroes could never be citizens or to discuss the question of slavery in the Territories. Looking backward we can see that it would have been wiser for the Court to have avoided a decision on these highly controversial questions and to have based its decision solely on Dred Scott's status under State law. Chief Justice Taney was one of the majority and although not the leader in the move for a discussion of these troublesome points, he must share the responsibility for the Court's action. Since he wrote the main opinion of the majority he has in fact borne most of the blame.

The Constitution is the Recognized Expression of the Sovereign Will

Taney's opinion is conservative and strict constructionist. Through it the Court proclaims that it will not take into consideration any change in conditions or attitudes, but will interpret the sovereign will only as it is constitutionally expressed. At one point Taney says:

[45] *Dred Scott v. Sandford,* 19 Howard, 452-54.

No one, we presume supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give the words of the constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning . . . and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[46]

The Explanation for the Breadth of the Decision

As we have already noticed, the immediate reason for the Court's decision to discuss the question of Negro citizenship and the constitutionality of the Missouri Compromise was the fact that Justices McLean and Curtis were going to deal with these questions in dissenting opinions. Under such circumstances the majority felt called upon to express their views.

But one must go farther than that in seeking an explanation for Taney's opinion and the conservative views expressed in it. Van Buren probably hit upon the truth when he wrote,

I think it more likely that the judges who united in the opinion that the Missouri Compromise Act was unconstitutional, seeing the extraordinary revolution which its repeal had produced in the political and fraternal feelings of the people of the United States, and sincerely believing the safety of the Union endangered by continued agitation upon so disturbing a subject, hoped to arrest

[46] *Ibid.*, 426.

it by the judgment of the Supreme Court upon the point in question,—a step which, if not actually called for, they yet believed fully justified by the case before them.[47]

Mr. Justice Grier, writing to President-elect Buchanan, February 23, 1857, apparently referring to the question of the constitutionality of legislation barring slavery from the Territories, said that he and Mr. Justice Wayne and the Chief Justice "concur in your views as to the desirableness at this time of having an expression of the opinion of the court on this troublesome question."[48] The country seemed on the verge of civil war. The question of slavery in the Territories was the outstanding cause of dissension. It had been a dangerous irritant since 1820, until now it seemed to have brought the Union to the verge of dissolution. Taney and his colleagues may reasonably have thought that by a judicial decision on the question they could remove it once and for all from the discussions of partisan politics.

One must remember in this connection that Taney's viewpoint is that of a man from the upper South. The Abolitionists had preached violent doctrines, and the Republican party seemed to be taking over their program. Southerners looked beyond the asserted desire of the Republicans to bar slavery from the Territories and feared that they would eventually seek to destroy it in the States. The national government had no constitutional power to abolish slavery in the States, but the question had assumed a moral aspect, and those who are engaged in a holy war stop at nothing. In his opinion Taney spoke as one who seeks to preserve established rights and the spirit of the Constitution. The growth and the aggressive tactics of the anti-slavery party had the southerners feeling that their backs were against the wall and their

[47] M. Van Buren, *Inquiry into the Origin and Course of Political Parties*, p. 362.

[48] *The Works of James Buchanan*, X, 106-7.

prosperity threatened and they were ready to fight when the issue was definitely made. Taney sought to save the Union by protecting property rights guaranteed in the Constitution. He proposed to settle the question by law and thus to prevent an appeal to arms. His spirit in this decision is that of Edmund Burke. Burke had a reverence for British political institutions and the established rights of Englishmen which amounted almost to a religion. Something of this feeling, with an American setting, was reflected in the Dred Scott decision where Taney was speaking for established institutions and established rights, and for orderly constitutional change if change must come. This is interestingly illustrated in a supplement which he wrote to the Dred Scott case in which he spoke of the American Revolution as a conservative revolution, much as Burke had justified the English revolution of 1688 on conservative grounds.

After asserting that the Declaration of Independence was not meant to include slaves Taney said:

> The American Revolution was not the offspring of fanaticism, nor was it produced by the wild theories of political dreamers. It was not designed to subvert the established order of society and social relations, nor to sweep away traditional usages and established opinions. On the contrary, it was undertaken to maintain ancient and established rights which had been invaded by the British Government. The colonists claimed the rights of Englishmen, as secured by *magna carta* and the principles upon which the British Government was founded. They did nothing more. . . . The Declaration of Independence was intended to preserve their ancient and established rights and privileges, and not to upturn their own social institutions and domestic relations. It was in fact intended as a conservative measure, and not as revolutionary, nor was it adopted in passion, but carefully, calmly, and deliberately considered.[49]

[49] Tyler, *op. cit.*, p. 609.

In the Dred Scott opinion Taney spoke as a lawyer. He endeavored to settle by judicial decision what debate in Congress and on the hustings could not settle but only disturb. He tried to avert the revolutionary disruption of a social and economic system. He was playing for high stakes, he played his trump card to maintain the old constitutional arrangements and prevent disunion—and he failed.

Public Opinion on the Decision

The decision raised a storm of protest in the North. The *New York Tribune* speaking editorially said, "The decision, we need hardly say, is entitled to just so much moral weight as would be the judgment of those congregated in any Washington bar-room."[50] And a few days later, "It is the election of Mr. Buchanan which has emboldened our five slaveholding Judges to volunteer this extra-judicial proclamation of barbarism and inhumanity as the staple of the United States Constitution. . . ."[51]

The legislature of Maine passed a resolution, "That the extra-judicial opinion of the Supreme Court of the United States, in the case of Dred Scott, is not binding, in law or in conscience, upon the government or citizens of the United States, and that it is of an import so alarming and dangerous, as to demand the instant and emphatic reprobation of the country."[52] The legislatures of Vermont, Ohio, and New York passed similar resolutions.[53]

In the Senate, William H. Seward made a bitter attack on the decision accusing the president and the justices of conspiring to fasten slavery on the Territories. He denied the Court's decision had any validity, except as it applied to the immediate case. And he voiced the threat, "Let the court

[50] March 7, 1857. [51] March 13, 1857.

[52] E. W. R. Ewing, *Legal and Historical Status of the Dred Scott Decision*, p. 195.

[53] *Ibid.*, pp. 189-94; *The Case of Dred Scott in the United States*, p. 104.

recede. Whether it recedes or not, we shall reorganize the court, and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and with the laws of nature."[54]

The South, on the other hand, hailed the decision as wise and just, and called on the nation to accept it as establishing the law. *The Richmond Enquirer* was typical of this viewpoint when it said, "Thus has a politico-legal question, involving others of deep import, been decided emphatically in favor of the advocates and supporters of the Constitution and the Union, the equality of the States and the rights of the South, in contradistinction to and in repudiation of the diabolical doctrines inculcated by factionists and fanatics; and that too by a tribunal of jurists, as learned, impartial and unprejudiced as perhaps the world has ever seen."[55] Three days later it said, "The decision in the Dred Scott case must be a *finality*, so far as federal legislation on the institution of slavery is concerned. . . . Abolitionism must now unmask, and wage its warfare openly and above board against the government *per se*, or bow to its behests and pass off the stage."[56]

Taney's opinion was not only bitterly attacked in the North, but it was also widely misrepresented. It was proclaimed that he had stated it as his own opinion that Negroes had no rights which white men were bound to respect.[57] This was, of course, not true. Yet even the New York legislature adopted a report containing such an assertion.[58]

As Taney watched the storm clouds swirl, while the lightning flashed around his head and the thunder rolled and reverberated, it reminded him of the Bank struggle of years before. In August he wrote to Franklin Pierce, "You see I

[54] *Congressional Globe,* March 3, 1858, p. 943.

[55] March 10, 1857. [56] March 13, 1857.

[57] Mary F. Taney, "Roger Brooke Taney," *Records of the American Catholic Historical Society,* XI, 39.

[58] *The Case of Dred Scott in the United States,* p. 104.

am passing through another conflict, much like the one which followed the removal of the deposits, and the war is being waged upon me in the same spirit and by many of the same men who distinguished themselves on that occasion by the unscrupulous means to which they resorted." But the criticism of his enemies was to him a relatively minor matter when he followed the path which he considered right, so he added, "And I have an abiding confidence that this act of my judicial life will stand the test of time and the sober judgment of the country, as well as the political act of which I have spoken."[59]

The Function of the Court as an Interpreter of the Sovereign Will

A writer in one of the legal periodicals suggested a good many years ago that Taney's opinion regarding the political status of Dred Scott was in keeping with the sentiment of a majority of the people of his time, and that "In being led by, instead of leading the moral sentiment of the times and of the country in which he lived, Judge Taney did what the judiciary are doing now, and what, with rare exceptions, they have done in every age."[60]

Taney did not regard it as the function of the Supreme Court to lead the moral sentiment of the times. To him the Court was only an agent of the sovereign whose duty it was to apply the sovereign will as constitutionally expressed. If the Constitution as written contained something which ought to be changed there was a method provided by which it could be changed, but that method was by constitutional amendment, not by judicial or legislative assumption of the people's power. In the Dred Scott case he was not concerned with the morality of slavery but with its legality. Finding slavery sanctioned by the Constitution he applied to it the same rules

[59] August 29, 1857, *American Historical Review*, X (1904-1905), 359.
[60] "Roger B. Taney," *The Chicago Law Times*, II, 327.

that would be applied to any other kind of property. And there cannot be much doubt that his application of the due process clause to prevent the abolition of slavery in the Territories would have met with little objection had the property in question been any other than human slaves. Mr. Justice Holmes not so long ago wrote into one of his decisions a warning which might well have been included in the Dred Scott opinion, when he said, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant the achieving the desire by a shorter cut than the constitutional way of paying for the change."[61]

The only objection which the student of political science or constitutional law can have to Taney's opinion is that it was unnecessary for the Court to deal with all the questions that were discussed. But the masterful art of evading issues, sometimes an attribute of statesmanship, was not one of Taney's strong points. He thought he saw the Union and the Constitution endangered by the question of slavery in the Territories. Believing that the whole controversy could be settled by constitutional law he wrote an opinion so thoroughly and so logically worked out that he must have meant it to establish the meaning of the sovereign will so clearly that it would not again be called in question.

[61] *Pennsylvania Coal Co. v. Mahon et al.*, 260 U. S. 415-16 (1922).

X

INDIVIDUAL RIGHTS

The Legal Nature of Individual Rights

THAT TANEY was not a radical individualist is evidenced by his views of the police power which a State might exercise over its citizens, and by his decisions upholding national laws and court processes. That he was a democrat is evidenced by his part in the Bank struggle and his views expressed during that period. He believed in the sovereignty of the whole people and the supremacy of the law. He never asked whether a statute conformed to the laws of nature or not. He was concerned only with its constitutionality. When the rights of individuals were involved he went not to the law of nature, but to the Constitution, to find them defined. Having found them there defined, he could conceive of no legitimate interference with them, save by the regular process of constitutional amendment. The Constitution was to him the supreme law of the land, binding alike on governors and governed.

During the course of his legal career Taney was connected with cases involving the right of free speech, the right of private property threatened in wartime, and the right to a writ of habeas corpus and a speedy and public trial by a jury. In each of these cases, from the time when he defended a Methodist minister's right to freedom of speech, until as an aged Chief Justice he delivered his memorable opinion in the case of *Ex parte Merryman*,[1] he stood with almost religious zeal for individual rights as established by constitutional law. The rights involved are particularly significant in English law and particularly cherished by English speaking peoples.

[1] Campbell's Reports, 254 (1861).

He takes his ground in the tradition of Pitt and Burke and the other great leaders who defended the constitutional rights which Englishmen had won at great cost in a long struggle with reluctant kings.

Free Speech

Taney's first important case in this group was that involving Reverend Jacob Gruber's right to freedom of speech in 1819, a case already alluded to in connection with the discussion of Taney's views on slavery. Reverend Gruber, a Methodist minister from Pennsylvania, delivered a sermon to a camp meeting in Washington County, Maryland in which he strongly condemned the institution of slavery.[2] In view of the fact that a considerable proportion of his audience were slaves, his language was regarded, not without reason, as being highly incendiary. He was indicted and charged with preaching this sermon with the intent of inciting slaves to insurrection, and for the disturbance of the peace. One of his friends prevailed on Taney, then recognized as one of the leading lawyers of Maryland, to appear as his chief counsel.[3] Taney's plea to the slaveholding jury who sat in judgment on the case of this Pennsylvania Abolitionist is notable for its boldness. He opened his argument with a defense of free speech, which is largely quoted in the paragraph that follows.

I need not tell you that, by the liberal and happy institutions of this state, the rights of conscience and the freedom of speech are fully protected. No man can be prosecuted for preaching the articles of his religious creed, unless, indeed, his doctrine is immoral, and calculated to disturb the peace and order of society; and subjects of national policy may at all times be freely and fully discussed, in the pulpit or elsewhere without limitation or restraint. If his doctrines were not immoral, if the principles he maintained were not contrary to the peace and good order of society, he had an

[2] W. P. Strickland, *The Life of Jacob Gruber,* pp. 136-39.

[3] *Ibid.,* p. 140.

undoubted right to preach them, and to clothe them in such language, and enforce them by such facts and arguments as to him seemed proper. It would be nothing to the purpose to say that he offended, or that he alarmed some, or all of his hearers. Their feelings, or their fears, would not alter the character of his doctrine, or take from him a right secured to him by the constitution and laws of the state.[4]

A lawyer's plea for his client cannot always be taken as an expression of his personal beliefs. However, in this instance Taney said that he himself was willing to say the same things Reverend Gruber had said,[5] and as his plea was in harmony with statements which he made on other occasions it is fair to assume that his plea for freedom of speech represents his own viewpoint. It seems hardly the sort of plea a man would make to a slaveholding jury if he did not believe what he was saying.

Taney's defense of the right of free speech rested on the provisions of the constitution and the laws of the State. He asserted the complete right, under them, of the individual to preach his religious doctrines and to discuss political questions. But the right of free speech was not something absolute to him. It was a right given by law. It could be limited by law. There was no right to preach immoral doctrines or to disturb the peace and order of the community. It is always difficult to define the limits of free speech in times when the privilege really means something. Undoubtedly there would be occasions when it would have been difficult to decide what words constituted a disturbance of the peace by Taney's criterion. The fact that he, a Southerner, defended the right to free speech of a man who had preached abolitionism to four hundred Negro slaves is evidence that he would scrupulously respect the spirit of the constitutional guarantees of individual rights. Of course the preacher in this instance probably

[4] *Ibid.*, pp. 155-56.

[5] *Ibid.*, p. 168.

meant to influence the slave owners more than the slaves, but such is the frailty of human nature that men often forget such details when their economic interests are threatened.

Property Rights in Time of War

The other cases which we shall consider in this connection involved individual rights endangered by the arbitrary acts of government officials in wartime, rather than as a result of a threat to the economic order. Two of them dealt with property rights ignored during the war with Mexico. The other involved the right of a citizen to a writ of habeas corpus and to judicial trial, denied by military authorities in the Civil War.

In 1849, in the case of *United States v. Guillem*[6] Taney revealed his sympathy with the needs of a laboring man who had been caught in the net of war in a foreign country. He cut through legalism to find the spirit of the law in order to help a man who had done no wrong and had no hostile intent.

Guillem was a French citizen who had lived in Mexico about three years working as a cook in a hotel. He was returning to France with his family when the ship on which they were sailing was seized by the American blockading forces. He had with him his savings of $2,860. This money, with the other property on board, was held by the American officers of the blockading squadron, and the passengers and crew were turned loose.[7] The case came to the Supreme Court on appeal.

Taney held that as soon as Guillem sailed from Vera Cruz, he lost his hostile character as a resident of Mexico and resumed his character as a French citizen with its rights and privileges of a neutral. In regard to his money, the decision called attention to the fact that it was not shipped as cargo or for trading purposes. "It . . . was the earnings of his in-

[6] 11 Howard, 47. [7] *Ibid.*, 60.

dustry in Mexico, and was taken with him for the support of himself and his family upon their return to France."[8] But the appellants insisted that even though the property belonged to a neutral it was subject to condemnation as having been shipped in violation of the blockade and because of the character of the vessel. Guillem had sailed on a merchant ship which had attempted to break the blockade. The blockade had been opened to allow neutrals to leave Mexico on the warships of their respective countries, but merchant ships had not been given permission to enter or leave.[9]

Taney was not content to stop with the terms of the order. He went behind it to find its purpose, and the reasons for the distinction made between warships and merchant ships. He pointed out that the privilege of carrying out passengers had been confined to ships of war because it was assumed that they would not allow it to be abused. The object of the order was to allow neutrals to leave the enemy's country and return to their own if they so desired. The neutral was not required or expected to remain on the warship. The warship was merely his means of escape from a country about to be made the scene of fighting. Permission to escape necessarily carried with it permission for the neutral to take with him the means of supporting himself and his family on the voyage and after they returned home. It was no breach of blockade for Guillem to take his savings with him, and the fact that he attempted to leave on a merchant ship liable to seizure did not implicate him in the guilt of the vessel. Taney's sympathetic appreciation of his position is shown by his statement that,

> Guillem must without doubt have seen citizens of neutral nations daily leaving the city for the ships of war, and taking with them the necessary means of support for themselves and their families. He appears to have done nothing more than avail himself of the

[8] *Ibid.*, 60.

[9] *Ibid.*, 60, 61.

most convenient opportunity that offered in order to accomplish the same object. . . . And in taking his passage in The Jeune Nelly, his intention, as far as it can be ascertained from the testimony, was merely to return to his own country, in a mode better suited to his humble circumstances and more convenient to his family, than by passing through the ships of war.[10]

In this decision Taney gave to the rules of blockade issued by American officials a liberal meaning in harmony with the principles of justice. No appreciable benefit would come to the United States from the seizure of an innocent laborer's $2,800.

Government officials were presumed to act for the benefit of the United States, and, unless the nation would benefit, an individual, even though a citizen of another country, should not summarily be deprived of his property under the guise of the war power. Taney was too steeped in the principles of the common law to look with favor on the destruction of private property rights by administrative orders.

In 1851, another case involving property seized by American military forces during the Mexican War came before the Court.[11] A trader named Harmony in company with other traders had followed in the rear of the American army invading Mexico. These men were allowed to trade freely in the areas subdued and occupied by the American forces. After the army entered Chihuahua, Harmony desired to leave it, but was forced by the commanding officer to accompany the army with his property. In the course of battle and on the march his wagons and mules were used by the army. Many of his mules were killed. Failing in his efforts to sell what remained of his property, he was forced to leave it behind when he finally left Mexico. He then brought suit against Colonel Mitchell, the officer who had executed the order

[10] *Ibid.*, 62.

[11] *Mitchell v. Harmony*, 13 Howard, 115.

forcing him to accompany the army after he had expressed his desire to leave it.

Early in the decision of the case, Taney called attention to the fact that Harmony had been engaged in trade sanctioned not only by the American military commander, but also by the Executive Department of the government. While it was true as a general rule that no citizen could lawfully engage in trade with the enemy the rule did not apply in a case of this kind. And he continued, "nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done."[12]

Colonel Mitchell claimed justification mainly on the ground that rumors had reached the commanding officer that Harmony meant to carry on an illicit trade with the enemy which would be harmful to the interests of the United States when he left the American army. Taney said that the seizure and detention of his property would have been justified if such a design had been proved. But there was no evidence in the record tending to show that the rumors had any foundation. "And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen."[13]

The fact that the army was away from home and in the enemy's country did not justify the commanding officer. Such circumstances could not enlarge his power over the property of a citizen. "And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own."[14] Taney admitted that there were occasions when private property might lawfully be taken or destroyed to prevent its falling into the hands of the enemy. In such cases the government was bound to make full compensation

[12] *Ibid.*, 133. [13] *Ibid.*, 133. [14] *Ibid.*, 134.

to the owner, but the officer was not liable for damages. His standard of judgment as to when such cases arose was clean cut and strict. He said, "But we are clearly of the opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."[15]

It is evident from these decisions that Taney would hold administrative officers strictly within the limits of the law, where individual property rights were concerned. We have already noticed his tendency to follow the spirit of English law protecting individual rights. In the case of *Mitchell v. Harmony* his enunciation of the law is notably in the English tradition. It is an established rule in England that administrative officers are personally liable for acts in excess of their authority.[16] The law, not the officers of the law, is supreme. Taney believed that this doctrine should apply in time of war as well as in time of peace. Officers of the army had no more legal power to ignore individual rights than had other officials. The army must be subordinate to the civil authorities. The individual was secure until judged punishable by the regular processes of the law.

Taney recognized the existence of emergency power. It is sometimes difficult to tell just when an emergency justifies the taking of private property for the public good. Taney thought that there were times when the administrative officer would have to use his judgment and if need be submit his case to a jury. If he had had good ground for believing that an emergency was so pressing as to justify the taking of

[15] *Ibid.*

[16] See A. V. Dicey, *Law of the Constitution*, Chap. 4.

private property he might go ahead, but if his power was questioned he would have to convince the jury that he had acted on reasonable grounds.[17] Such a rule has a wholesome effect on administrative officers who may sometimes become so obsessed with their own duties and powers that they forget the rights of the people whose servants they are. If the liberties of the people are to be secure, emergency power must be carefully limited. Taney did not allow even the exigencies of war to blind him to these elemental facts.

The Case of John Merryman

The most important of the cases involving individual rights, with which Taney was connected, was the case of *Ex parte Merryman.*[18] In his opinion in that case he held that the President had no power to suspend the privilege of the writ of habeas corpus. His opinion was delivered at a time when war feeling was running high, and it was in direct opposition to a war measure of the President. Under such circumstances it was inevitable that it should cause tremendous reverberations. The Abolitionists, who had not quite forgotten the Dred Scott decision, were aroused again. That Taney should have delivered such an opinion at such a time was additional evidence that he was utterly oblivious to public opinion or his personal fate when a principle was involved. In this case he considered the issue one of the most vital importance. It was a question of protecting the individual's right to live under a rule of law.

The facts in the case were as follows: John Merryman, a citizen of Baltimore, while peacefully sleeping in his home was aroused at two o'clock one morning in May, 1861, by an armed force. These soldiers got him out of bed and took him to Fort McHenry where he was imprisoned without

[17] *Mitchell v. Harmony,* 13 Howard, 135-37.

[18] Campbell's Reports, 246 (1861).

warrant from any lawful authority. He applied to Chief Justice Taney for a writ of habeas corpus. Taney, sitting in Baltimore on circuit, granted the writ. When the writ was served on the commander of Fort McHenry he refused to obey it. As Taney said, " . . . it is not alleged in the return, that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer constituted these crimes."[19] The general in command at Fort McHenry asserted that he had been authorized by the President to suspend the right to the writ of habeas corpus in such cases. Taney knew that the United States marshal acting under the direction of the court could not summon any force strong enough to take the prisoner away from the army. He wrote out his opinion and ordered it filed and all the proceedings laid before the President.[20]

The Writ of Habeas Corpus Could be Constitutionally Suspended only by Congress

He said, as the case came before him, it seemed that the President not only claimed the right to suspend the writ of habeas corpus himself, but also the right to delegate the power to a military officer and allow him to decide whether he would or would not obey any judicial process served upon him. This, Taney said, was a surprising doctrine, for he had supposed it admitted by all that the writ of habeas corpus could not be suspended except by act of Congress.[21]

He then proceeded to establish the point that the privilege to the writ could not be suspended, save by Congress. He

[19] *Ibid.*, 254-55.

[20] Tyler, *op. cit.*, p. 645.

[21] Campbell's Reports, 255.

pointed out that the clause in the Constitution which authorizes the suspension of the right to the writ was in a section of an article devoted to the legislative department, and without the slightest reference to the executive department.[22] After enumerating the powers of Congress the authors of the Constitution, in order to be sure that Congress should not interfere with certain fundamental rights of individuals or with the powers of the States, placed certain specific limitations on the powers of Congress. The provision that the writ of habeas corpus should not be suspended except when in cases of rebellion or invasion the public safety required its suspension was among these limitations.[23]

Taney also pointed out that the second article of the Constitution, which provided for the organization of the executive department and defined its powers, contained nothing which could be construed as giving the President power to suspend the writ of habeas corpus. The President had no power to arrest anyone whom he might believe guilty of an offense against the laws, nor could he authorize any officer to exercise such a power. The fifth amendment expressly provided that no person should be deprived of life, liberty, or property without due process of law, which Taney said, "is, judicial process."[24]

He also asserted that in case the privilege of the writ should be suspended by Congress and an individual was arrested he could not be held in prison or tried before a military

[22] Sec. 9 of Art. I. Article I begins, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The whole article deals with Congress, except section 10, which contains the limitations on the powers of the States. Section 9 begins, "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress. . . .

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

"No Bill of Attainder or ex post facto law shall be passed."

[23] Campbell's Reports, 256-57.

[24] *Ibid.*, 258-59.

tribunal. The Constitution guarantees him the right to a speedy and public trial by an impartial jury, the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."[25]

In support of his contention that only Congress might constitutionally suspend the privilege of the writ of habeas corpus, Taney relied not only upon reason but also cited authorities. He traced the history of the writ of habeas corpus in England and quoted Blackstone, showing that it was a settled principle of English law that only Parliament could suspend the right to the writ.[26] But he did not have to depend on English law alone. He quoted from "the late Mr. Justice Story" whom he referred to as "not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the supreme court of the United States." Mr. Justice Story had assumed that the power of suspending the writ of habeas corpus in America belonged to Congress.[27] Then he quoted from the decision in *Ex parte Bollman*[28] to show that Marshall also held that the power belonged to Congress.[29]

Military Dictatorship

While it seemed to Taney that the suspension of the privilege of the writ of habeas corpus by the military authorities was a lawless act, he also felt that the situation was made even more serious because other constitutional provisions had been ignored. The military authorities had forcefully thrust aside

[25] *Ibid.*, 259-60.

[26] *Ibid.*, 261-65. He quotes from Blackstone's *Commentaries*, I, 137 and III, 133-34.

[27] Campbell's Reports, 265-66. He quotes from Story's *Commentaries*, vol. III, sec. 1336 (Taney referred to section 1336; in the 5th ed. it is sec. 1342.)

[28] 4 Cranch, 95, 101.

[29] Campbell's Reports, 267.

the judicial authorities whose function it was to administer the law and had substituted a military government in its place.[30] All this was without any reasonable excuse, it seemed to him. For

> Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial authority of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; . . . There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.[31]

After reiterating that the Constitution contained guaranties to the individual against deprivation of life, liberty, or property without due process of law, against unreasonable searches and seizures, against arrest without legal warrant, and guaranteed him a speedy trial in a court of justice, Taney said, "These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms." Under such circumstances it seemed to him that the people were living not under a government of law, but under a military dictatorship.[32]

Believing as he did in a government of law, Taney looked with abhorrence on anything that savoured of military rule. Speaking of the acts which had led to the Merryman case he

[30] *Ibid.*, 267.

[31] *Ibid.*, 268. Compare with *Ex parte Milligan*, 4 Wallace, 123 (1866), in which, after referring to persons in the military service, the Court says, "All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury." And on p. 127, "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."

[32] Campbell's Reports, 268-69.

declared, ". . . I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[33] Shortly after delivering this opinion he wrote to Franklin Pierce, "I hope that . . . the North, as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which end as it may will prove ruinous to the victors as well as the vanquished."[34] If the Union could be saved only by the sacrifice of constitutional liberty it was too great a price to pay.

The Issue of Law Against the Necessity of War

The issue was one of law against supposed military necessity. This was admitted by some of the critics of the Merryman opinion. *The New York Times* said, "The majesty of the law must, in all cases, succumb to the necessities of war."[35] At the same time *The World* said, "A refusal to obey the writ of *habeas corpus*, when its suspension has not been authorized by Congress, is of course illegal; the only question is, whether the public exigency is sufficient to justify it, and each case must depend for its justification on its own peculiar circumstances."[36]

Taney's opinion upholding the regular processes was in

[33] *Ibid.*, 269.

[34] Written June 12, 1861. *American Historical Review*, X (1904-1905), 368.

[35] May 29, 1861.

[36] May 29, 1861.

harmony with the established principles of English and American law. As he pointed out, he was adhering to the law as interpreted by Blackstone in England and Marshall and Story in the United States.[37] One modern English writer has aptly said that the privilege of the writ of habeas corpus "is perhaps, the ark of the covenant in the Anglo-American conception of freedom."[38] Any attempt to justify executive suspension of the writ from the standpoint of constitutional law is like trying the magician's trick of pulling rabbits out of a hat.[39] W. W. Willoughby says, "That Taney's reasoning is correct there would now seem to be little question."[40] The supporting evidence for Taney's position was perhaps marshalled most thoroughly by David Dudley Field, counsel for Milligan, in the case of *Ex parte Milligan*[41] in 1866.

In the decision of the Milligan case the Supreme Court said:

The proposition is this: that in a time of war the commander of an armed force . . . has the power, within the lines of his military district, to suspend all civil rights and their remedies . . . and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. . . . The

[37] It seems to have been generally accepted among the early legal authorities that only Congress could suspend the writ of habeas corpus in the United States. St. George Tucker is an early authority who might have been cited along with Marshall and Story. He said in his *Blackstone's Commentaries*, "In England the benefit of this important writ can only be suspended by authority of parliament. . . . In the United States, it can be suspended, only by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion." Vol. 1, Appendix, note D, p. 292.

[38] H. J. Laski, *Liberty in the Modern State*, pp. 51-52.

[39] For such an attempt see Joel Parker, *Habeas Corpus and Martial Law* (1862).

[40] *The Constitutional Law of the United States*, III, 1615. J. R. Tucker in *The Constitution of the United States*, II, 643, says, "What Federal authority can suspend this privilege? The answer is distinct: No power but Congress can suspend it; the President cannot."

[41] 4 Wallace, 2.

statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. . . . If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.[42]

Five years after *Ex parte Merryman* the Supreme Court was voicing Taney's doctrine in language even more compelling, if possible, than he had used. As the historian of the Court has said, "Never did a fearless Judge receive a more swift or complete vindication."[43]

The whole question of how far a government may go in ignoring individual rights in wartime is intimately connected with the theory of the location of sovereignty and the manner of its expression which is accepted. As we have already noticed, Chief Justice Taney believed that sovereignty rested in the people of the United States,[44] that they had spoken authoritatively in the Constitution, and that the provisions of the Constitution must be supreme until changed by the regular prescribed method.[45] The government was not sovereign. It could not change the Constitution or ignore its provisions in any particular. Such a theory, if accepted, might set up irritating restraints on governmental action in time of war, because in war quick and drastic action is sometimes necessary. At times the Constitution seems to stand in the way of an apparently desirable war policy. The Constitution contains definite restraints on governmental action, and the Constitution is rather difficult of amendment; at any rate the process prescribed is not a rapid one. If the sovereign can

[42] *Ibid.*, pp. 124-26.

[43] Charles Warren, *The Supreme Court in United States History*, II, 374.

[44] *Dred Scott v. Sandford*, 19 Howard, 404.

[45] *Ableman v. Booth*, 21 Howard, 525.

make its will known in no other way the government may be embarrassed in time of crises, unless it chooses to ignore the Constitution.

While Taney's theory, a heritage from established Anglo-American law, has been generally accepted by American jurists, it is possible that it is too idealistic to meet with general acceptance in times of crisis. The German philosopher Hegel believed that sovereignty, although possibly the attribute of the state in theory, was in reality voiced in the final decisive expression of an individual will.[46] More recent writers have contended for the kindred doctrine that, for practical purposes, the government is the sovereign.[47] In time of war this conception seems to guide American practice. The government, by tacit consent, rules with scant regard for the constitutional limitations which purport to protect the individual. Perhaps the sovereign people may speak in other ways than by amending the Constitution.

There are those who believe that war justifies the suspension of law, if such suspension will apparently further the ends of war. Treitschke was representative of a large group of German thinkers in holding that political rights existed not for the sake of the individual, but for the sake of the state,[48] and when its very existence was at stake the state might suspend the rights of its citizens.[49] Treitschke was thinking of the government as acting for the state in such an emergency. Such theories are not at all peculiar to German thinkers. We have already called attention to the fact that the *New York Times* and *The World* unhesitatingly admitted that Lincoln's suspension of the writ of habeas corpus

[46] *Hegel's Philosophy of Right*, translated by S. W. Dyde, Sec. 279, pp. 286-91.

[47] H. J. Laski, *A Grammar of Politics*, p. 145; Z. Chaffee, *Freedom of Speech*, pp. 375-76.

[48] H. W. C. Davis, *The Political Thought of Heinrich von Treitschke*, p. 49.

[49] Heinrich von Treitschke, *Politics*, translated by B. Dugdale and T. DeBille, I, 156-57.

was illegal but they justified it on the ground of military necessity. The World War led to the expression of similar ideas. One writer in 1918 asserted that there were practically no limitations on the war power of the American government.[50] He said that the war leaders would use every means they thought necessary for winning the war whether they were constitutional or not, and that it would be wise to accept an interpretation of the Constitution which would make it elastic enough to allow everything. The theory has also been advanced that individual rights are relative, not absolute goods, and if they are less useful to society in war than in peace they will receive less protection.[51]

Such views are in direct contradiction to those held by Taney. To him the Constitution was the supreme law in war as well as in peace. In a paragraph that reveals some of the most important principles in his political theory he said:

> Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendment to the constitution, in express terms, provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."[52]

As Taney saw it, the sovereign had spoken, its will was written into the Constitution, and its will was law.

That Taney's theory was representative of the sound judi-

[50] H. J. Fletcher, "The Civilian and the War Power," *Minnesota Law Review*, II (1918), 110-31.

[51] J. P. Hall, "Free Speech in War Time," *Columbia Law Review*, XXI (1921), 537.

[52] Campbell's Reports, 260-61.

cial thought of his time would seem indicated by the decision of the Supreme Court in *Ex parte Milligan* already alluded to. In that decision, when the Civil War was hardly more than ended, the Court, by then composed largely of Republicans, asserted that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[53] The Supreme Court of Illinois reiterated the doctrine in 1867, saying, "The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the Constitution, and is inconsistent with every principle of civil liberty and free government."[54]

The Background of Taney's Theory

Taney's fervent belief in the supremacy of the law was probably an inheritance from English thought. Englishmen have long regarded the reign of law with the same fervor Taney did. Their feeling is largely a result of the traditions of British freedom. It is probably strengthened when as young men at Oxford they read Aristotle and find him saying, "To invest the law then with authority, is, it seems, to invest God and intelligence only . . . even the best of men in authority are liable to be corrupted by anger. We may conclude then that the law is intelligence without passion and is therefore preferable to any individual."[55] Edmund Burke, bitter opponent of the radical natural rights philosophy of revolutionary France, thought that the right to live by a rule of law was a natural right of men.[56] Englishmen have not yet forgotten the doctrine. In the midst of the World War Earl

[53] 4 Wallace, 120, 121 (1866).

[54] *Johnson v. Jones et al.*, 44 Illinois, 155.

[55] *The Politics*, translated by J. E. C. Welldon, Book 3, Chap. 16, p. 154.

[56] "Reflections on the Revolution in France," *Selected Works*, edited by E. J. Payne, II, 69.

Curzon declared that a country was on the road to disaster whenever it allowed a military administration to get the upper hand.[57]

William Pitt made one of the greatest speeches of his career in defense of the cause of John Wilkes, an English scoundrel, because through this case he was contending for the security of all Englishmen.[58] His ideas presented on that occasion accurately express the theory held by Taney. He asserted that every exertion of power beyond the bounds prescribed by the constitution, even though the House of Commons be the perpetrator, was arbitrary, illegal, and threatened destruction to the nation. To him the first principle of the constitution was that the subject should not be governed by the arbitrary will of any one man or body of men, but by laws. An English subject was possessed of certain rights which the laws had given him, and which the laws alone could take from him.

Taney's high regard for individual liberty as established by law may have been influenced by the developments of the period in which he lived. Early in his political career he aligned himself with Jacksonian democracy, and in the struggle over the Bank charter he gave evidence of his sympathy for the rights of common men and his belief that their liberty should be preserved. The years that followed the triumph of Jacksonian democracy were years of vast importance for the common people. One of the outstanding characteristics of the period between 1830 and 1860 was the increasing recognition and protection of individual rights by law. Married women, infants, debtors, bankrupts, and criminals had previously had few rights guaranteed by law. In this period more humane and reasonable legislation vastly improved

[57] *The New York Times*, May 11, 1918.

[58] Speech on the case of John Wilkes, January 9, 1770, in C. A. Goodrich, *Select British Eloquence*, pp. 110-13.

their status. Laborers were allowed to organize in unions.[59] It was a period when people were thinking in terms of human rights, not in the theoretical fashion of the natural rights school of the previous century, but in practical and critical comparison of the legal status of human beings as it was and as justice demanded that it should be. Taney's thought was very much in harmony with the democratic and humane tendencies of this age.

Undoubtedly the nature of Taney's education and his legal experience were also partly responsible for his reverence for the law. In college he had felt the influence of Dr. Nisbet who, while he had little faith in American democracy, was a Scotch Whig with an inherent respect for the great British institutions. Dr. Nisbet's influence was probably something like Burke's would have been. After getting a good college education and reading widely Taney prepared himself for the practice of law, not as John Marshall had done, by attending lectures for six weeks,[60] but by three years of hard study. Following his admission to the bar he developed a large and important law practice, and came to be regarded as a thorough student of the law. With such a background it was natural that he should develop a respect for the principles of the law and a high regard for its place in human affairs. It was not strange either that his viewpoint was largely English.

Taney's Decision was Ignored by the Executive

Taney's defense of the right of the citizen to a rule of law in the case of John Merryman was like the voice of one crying in the wilderness. It had no immediate effect on the methods employed by the President and the army. President Lincoln, without congressional authorization, continued to

[59] Charles Warren, *A History of the American Bar*, p. 446.

[60] A. J. Beveridge, *The Life of John Marshall*, I, 154.

suspend the right to the writ of habeas corpus in particular instances and in particular localities, leaving a wide amount of discretion to the army officials.[61] Finally in September, 1862, he issued a proclamation that all persons discouraging enlistments or guilty of other disloyal practices should be subject to martial law and to trial and punishment by courts-martial or military commission. The privilege of the writ of habeas corpus was suspended in the case of all persons arrested during the war and imprisoned by military authorities.[62] Without the sanction of law the federal government arrested men by the thousands and confined them in military prisons. The number of such executive arrests was certainly over 13,000, and it has been estimated to have been as high as 38,000.[63] This policy was bitterly criticized in some quarters, but it is generally assumed that the people as a whole supported it.[64]

President Lincoln, during the Civil War accepted the Machiavellian doctrine that the end justifies the means. The end was national unity and it was to be obtained by force. During the same period national unification was achieved in Italy and Germany by similarly aggressive methods. Pro-

[61] Richardson, *op. cit.*, vol. VI; June 20, 1861, authorizing the suspension of the writ in the case of a particular man suspected of "treasonable practices," p. 19. July 2, 1861, authorizing the suspension of the writ between New York and Washington, p. 19. October 14, 1861, authorizing further suspension of the writ, p. 39. December 2, 1861, authorizing Major General Halleck to suspend the writ in Missouri, p. 99. See also orders signed by the Secretary of War; February 14, 1862, pp. 102-4; February 25, 1862, pp. 108-9; February 27, 1862, p. 109; April 5, 1862, p. 112. The order of February 25, 1862 dealt with censorship of the press.

[62] *Ibid.*, pp. 98-99 (September 24, 1862). Charles Warren has called attention to the fact that this proclamation was issued just two days after Lincoln had issued his Emancipation proclamation, "Lincoln's Despotism," *The New York Times*, May 12, 1918. Finally on March 3, 1863 Congress passed an act authorizing the suspension of the privilege of the writ of habeas corpus.

[63] J. P. Hall, "Free Speech in War Time," *Columbia Law Review*, XXI (1921), 527-28.

[64] Charles Warren, "Lincoln's Despotism," *The New York Times*, May 12, 1918.

fessor Dunning has said, "Louis Napoleon, Otto Von Bismarck, Camillo di Cavour and Abraham Lincoln were hard-headed politicians, whose methods subordinated the ideal and sentimental to the practical."[65] In America, for the time being at least, Taney was in the minority. He was standing in the face of a nationalism bent on American unification regardless of the will of a fraction of the people, and it was to be achieved regardless of the Constitution.

Theoretical justification for the policy pursued by Lincoln may perhaps be found in the doctrine that anything is justifiable when the existence of the nation is at stake. But, Taney would have contended, the President is not the nation. He is only an elected officer with certain delegated and limited powers. The sovereign has spoken and its will is written into the Constitution. Whatever may be sound theory, Americans in time of peace have been devoted to the forms of constitutional liberty. But in time of war many of them have accepted the doctrine that the sovereign is not bound by the law, and that somehow or other the officers of the government exercise the sovereignty.

Public Opinion on the Decision

Taney delivered his opinion in the Merryman case at a time when the streets of Baltimore were full of armed soldiers and the cannons of Fort McHenry were pointed upon the city. As he left the house of his son-in-law on his way to court he remarked that it was likely that he would be imprisoned in the fort before night, but he was going to do his duty.[66] It was a dramatic occasion when the eighty-four year old Chief Justice in a calm low voice read to an audience tense with suppressed emotion his defense of individual rights as guaran-

[65] W. A. Dunning, *A History of Political Theories from Rousseau to Spencer*, p. 298. By permission of The Macmillan Company, publishers.

[66] Tyler, *op. cit.*, p. 427.

teed by law. For his opinion he faced the condemnation of a people gripped by the patriotic intolerance of war and, it seemed at the time, military arrest. A few weeks later in the United States Senate, Senator Polk of Missouri referring to Taney's action said:

I honor him for the brave and courageous discharge of his duty under the circumstances in which he was placed. He was in the midst of civil tumult; he was surrounded by soldiers, and by arms. While I honor him for his profound learning, and his great knowledge; while I honor him for his sage wisdom and his long experience; I honor him also, and above all, for the simple and sublime courage that he manifested in applying the plain principles of the Constitution, under the circumstances in which he was placed. He is a worthy head of the conservative branch of the Government.[67]

The Daily Exchange of Baltimore, speaking editorially said of Taney's opinion, "Whatever be the result of the conflict which produced it, the incident itself will be recorded forever, as one of those glorious protests of the right against the wrong, which dignifiy the disasters of a people and sow the ineradicable seeds of their ultimate redemption."[68]

Public opinion in the North was, in general, bitterly hostile toward Taney for his action. *The New York Times* while admitting that executive suspension of the writ of habeas corpus was illegal, said that respect for the courts was weakened by a fruitless conflict with the military forces when they were in control. The editorial went on to accuse Taney of being anxious to free a traitor.[69] He was himself "steeped to the crown in treason." "Too feeble to wield the sword against the Constitution, too old and palsied and weak to

[67] *The Congressional Globe*, 37th Cong., 1st sess., July 10, 1861, p. 48.

[68] May 28, 1861. Two of the editors of the *Daily Exchange* were arrested in September, and the paper was suppressed, J. T. Scharf, *The Chronicles of Baltimore*, pp. 616-17.

[69] May 29, 1861.

march in the ranks of rebellion and fight against the Union, he used the power of his office to serve the cause of the traitors. . . ."[70] *The World* was milder in its condemnation, but its editors said that the tone which Taney assumed toward the President was "at least uncalled for and in bad taste."[71]

Even though Taney had been able to foresee that his decision would be ignored by the President and condemned by prevailing public sentiment there can be little doubt that his decision would have been the same. He was writing into the record his interpretation of principles vital to the liberties of the citizen. As a member of the Supreme Court provided for by the Constitution he had sworn to uphold the Constitution. He had a duty to perform and nothing could swerve him from its performance.

Conclusion

In 1819 before a slave-owning jury Taney defended a Methodist Abolitionist's right to free speech. Forty-two years later, in the shadow of Fort McHenry's guns, he defended John Merryman's right to be tried according to the methods prescribed by law. He had travelled a long road in the meantime, but neither his principles nor his alacrity in their defense, had suffered any change. At the close of a long career he could voice in fearless and fervent language his belief in the right of the individual to live by a rule of law. It had been one of the fundamental principles of his political faith from the beginning to the end.

[70] May 30, 1861.

[71] May 29, 1861.

XI

THE RECONCILIATION OF LIBERTY WITH THE SOVEREIGNTY OF THE STATE

The Supremacy of the State

The state which Taney envisages is a powerful state. In it there is no question about "the superiority of public force to private forces."[1] As he sees it, the private forces which threaten most the superiority of the public force in the modern state are those which represent the attempts of economic groups to infringe upon the welfare of the whole people. His convictions in this regard, most forcefully expressed in the Bank struggle, were consistently applied in his judicial decisions, especially in those affecting corporations. In such cases he was constantly on the alert to maintain the supremacy of the state.

Taney's decisions show a marked tendency to place the public welfare ahead of private interests. As we noticed in the discussion of the police power he allows the state almost unlimited power to legislate for the general welfare. Whether the matter in question be liquor laws passed with a view to the regulation or prohibition of a business believed injurious to health or morals, or a law designed to prevent the increase of poverty and pauperism Taney sustains the legislature when there is not a clear constitutional prohibition against such legislation. His realistic conception of the problems that faced the legislative officers of the state is illustrated in his dissenting opinion in the *Passenger Cases* where, speaking of immigrants, he said:

[1] "The superiority of public force to private forces is the germ of the principal attribute of the State—the attribute of sovereignty. . . ." *The Collected Papers of Paul Vinogradoff*, edited by H. A. L. Fisher, II, 351.

Now in the great commercial emporium of New York, hundreds are almost daily arriving from different parts of the world, and that multitude of strangers, among whom are always many of the indigent and infirm, inevitably produces a mass of pauperism, which if not otherwise provided for, must press heavily on the industry of its citizens; and which, moreover, constantly subjects them to the danger of infectious diseases. It is to guard against these dangers that the law in question was passed.[2]

Taney's high view of the power of the state led him to assume that the representatives of the sovereign could be given power to attack such evils along whatever lines might seem best to them. As a member of the Supreme Court of the United States he assumed that the State legislatures had such power except where specifically limited by the Constitution.

In his conception of the nature of the state and the location of sovereignty, and in his view of the predominance of the social welfare over private interests, Taney shows a striking similarity to Rousseau. In the thought of Rousseau the state is a corporate body formed by the mutual agreement of the members. Each member has a two-fold capacity—he is both sovereign and subject.[3] The state has "absolute power over all its members."[4] Thus far Rousseau's conception of the state is essentially the one which Taney accepted.

The Legal Nature of the State

Taney, however, differs from Rousseau at an important point in his theory. He speaks as a jurist and emphasizes the judicial nature of the political association more than Rousseau did. While Taney was a liberal judge and not as tightly bound by ancient rules of law as are more conservative judges, his profound respect for the law and for legal

[2] 7 Howard, 485 (1848).

[3] *The Social Contract*, Book 1, Chap. 7.

[4] *Ibid.*, Book 2, Chap. 4, p. 27.

methods influenced most of his expressions of theory. He seemed to have had something of Aristotle's feeling that "law is intelligence without passion" and much to be preferred to the rule of men.[5]

To Rousseau the sovereign is beyond law. "The Sovereign, merely by virtue of what it is, is always what it should be."[6] It cannot be bound constitutionally or in any other way. It is against the nature of the body politic "for the Sovereign to impose on itself a law which it cannot infringe."[7] That he meant for this to include constitutions as well as other expressions of state policy is evidenced by the further statement that "there neither is nor can be any kind of fundamental law binding on the body of the people—not even the social contract itself."[8]

Taney's state is a legal state. It is formed by a compact which is the supreme law of the land. It is a subject of duties as well as rights. These are not duties imposed on it in the same sense in which legal duties are imposed on individuals.[9] They are of two sorts, constitutional and moral. The constitutional limitations are self-imposed, but they chart a course which is the only one that the state can be assumed to follow. Taney recognizes no expression of the public, save that of a constitutional nature, as an expression of the sovereign will.[10] Besides the constitutional limitations there are moral obligations which apply to the state as well as to individuals.[11] However, if the state ignores moral obliga-

[5] *The Politics of Aristotle,* Book 3, Chap. 16, p. 154.

[6] *The Social Contract,* Book 1, Chap. 7, p. 17.

[7] *Ibid.* [8] *Ibid.*

[9] "If such be the construction of this law . . . it is the first instance in the history of nations in which a sovereignty has imposed a penalty upon itself, in order to compel it to be honest in its dealings with individuals. A sovereignty is always presumed to act upon principles of justice, and if, from mistake or oversight, it does injury to a nation or an individual, it is always supposed to be ready and willing to repair it." *Bank of the United States v. The United States,* 2 Howard, 759-60 (1844).

[10] Perhaps best illustrated in *Ex parte Merryman,* Campbell's Reports, 254 (1861), and *Ableman v. Booth,* 21 Howard, 520 (1858).

tions and acts unjustly there is no authority, other than the sovereign itself, which can force a change of policy. The sovereign is a free moral agent. It may choose between good and evil, but if it chooses the evil it will suffer.[12]

Although Taney held this view of the power of the sovereign he was quick to condemn the acts of governmental agents when they ignored the moral obligations of the sovereign and its agents, unless they were constitutionally authorized. This was illustrated by a Civil War decision which he handed down in a case involving the tactics of a government detective who had taken steps which practically amounted to the instigation of a crime for which he arrested the offender. Summarizing Taney's opinion in the case the reporter said:

> The parties he considered as having been seduced and betrayed into the purchase of the goods by the Provost-Marshal's officers, and could see no possible benefit to accrue to the Government from such a seizure that would in any way compare with the great evil that would arise from a court of justice countenancing such conduct by a condemnation of the goods. It would encourage officers to betray the weak and imprudent into all sorts of violation of law and would be demoralizing in the extreme to the officers themselves; and he was at a loss to see how any court of justice could condemn property under the circumstances of this seizure, unless the means employed be also countenanced.[13]

[11] In 1832 when he was Attorney General Taney, at the request of the President, rendered an opinion in regard to the compensation to be allowed to the widow of a consul who had died in the service. In the course of the opinion he said, "This, I think, is not only an equitable construction of the law, but one which . . . is called for by the principles of justice; and it would be a severe and harsh construction of it to deny . . . to his widow and family, those means of coming again to their home which would have been offered to them by the public if he had lived." *Official Opinions of the Attorneys General,* II (1825-1835), 522. See also *Ohio Life Insurance and Trust Co. v. Debolt,* 16 Howard, 428-29 (1853).

[12] *Ohio Life Insurance and Trust Co. v. Debolt,* 16 Howard, 428-29 (1853). Quoted in chap. 3, p. 205.

[13] Tyler, *op. cit.,* p. 441. This case is not reported in Campbell's Reports, since these Reports include only his decisions to 1861. Apparently it is not to be found in the *Federal Cases* either.

In a similar case in 1928 Mr. Justice Brandeis said in a dissenting opinion, "This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts."[14] Mr. Justice Brandeis and Chief Justice Taney were thinking, in these opinions, of the social consequences of such conduct by government officers. There was something about it that was morally reprehensible. It was incompatible with the dignity of government in a democracy and incompatible with government by law.

The Supreme Law

Taney's belief in the inviolability of the Constitution and the supremacy of constitutional laws has been treated in some detail in the course of this discussion of his theory. Because of his tendency to place social welfare above individual interests he upheld the legislatures in most of their measures dealing with the general welfare. However when he thought Congress had interfered with a Constitution-guaranteed right of individuals by depriving them of property without due process of law, he wrote his powerful Dred Scott opinion upholding the Constitution at the expense of the statute.[15] His belief in the supremacy of the Constitution and its "great and fundamental laws, which congress itself could not suspend"[16] led him in the Merryman case to write a ringing condemnation of the tactics of military officers acting under the President's orders. There was no risk which he would not take personally in order to maintain the supremacy of the Constitution and the reign of law. It was his conviction that free government could not exist without "a ready

[14] *Casey v. United States*, 276 U. S. 425.
[15] 19 Howard, 393 (1856).
[16] *Ex parte Merryman*, Campbell's Reports, 269 (1861).

obedience to the laws as administered by the constituted authorities."[17]

Taney's view is essentially like that of one of his contemporaries who said, "The sovereignty of the law . . . is the foundation stone of all society. . . . He who disobeys it is an enemy to his race and a traitor to himself; he who defies it, is a rebel against the power, which he himself has contributed to call into existence and to make supreme."[18]

The Importance of the Court

Because of his acceptance of the Constitution as the ultimate expression of the sovereign will and his belief in the supremacy of the law, Taney exalted the position of the Supreme Court as the final interpreter of the law. Martin Van Buren, critical of Taney's conception of the position of the Court, thought he saw in it the shadow of John Marshall. Explaining the background of Taney's views he said:

> He had occupied a distinguished place in the Federal ranks to an advanced period in his professional life; he had acquired an enviable fame at the Bar, and had left it . . . with feelings of admiration and respect not only for his professional brethren but for the Bench. . . . It was hardly to be expected that he should, on taking his seat, have proved insensible to the *esprit du corps* which had long prevailed in and around that high tribunal, and which, directed by the plastic hand of John Marshall, had charmed minds as strong as his own, even although professing opposite political principles. . . . Although the master-mind which gave it life and by which it was installed has departed, the proceedings now the subject of our review give us abundant reason to apprehend that the spirit has retained its place and power.[19]

[17] *Ableman v. Booth*, 21 Howard, 525 (1858). See also *Kennett et al v. Chambers*, 14 Howard, 50 (1852).

[18] Henry St. George Tucker, *Lectures on Government*, p. 14.

[19] Van Buren, *op. cit.*, p. 363. "The subject of our review" was the Dred Scott decision.

This was the verdict of a friendly critic who had been associated with Taney in political leadership under Andrew Jackson. He never forgot Taney's Federalist background. And because of it he was just a little doubtful about the orthodoxy of his democracy.[20] When he found Taney assuming that the Supreme Court should be the final authority in interpreting the law, Van Buren jumped to the conclusion that it must be the Federalist taint, and the lingering influence of the tough old Federalist who had preceded Taney on the Bench. It is true that most of Taney's ideas on the position of the Court would have met with Marshall's approval. But there was nothing in them incompatible with the democratic faith. In Taney's theory they were part of the same pattern. The Court was the great defender of the settled will of the sovereign people as constitutionally expressed.

As he saw it the Court was the chief agency for the maintenance of the political system established by the Constitution. In connection with a discussion of the power conferred upon the Supreme Court he said:

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government. And as the constitution is the fundamental and supreme law, if it appears that an act of congress is not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void.[21]

He regarded the Supreme Court as peculiarly fitted for such a high duty because he thought of it, not as the creature of the government, but as the instrument of the sovereign people. Of it he said, "This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the federal government, but by the people of the

[20] *Ibid.*, p. 365.

[21] *Ableman v. Booth*, 21 Howard, 520 (1858).

States, who formed and adopted that government, and conferred upon it all the powers, legislative, executive, and judicial which it now possesses."[22]

In its exercise of judicial power Taney expected the Court to be supreme, and he thought it entitled to the support of the executive. In the Merryman case he said:

> And the only power, therefore which the president possesses, where the "life, liberty, or property" of a private citizen are concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents . . . but he is to take care that they be faithfully carried into execution, as they are expounded or adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm. But in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.[23]

Taney again had occasion to express his views of the independent position which the Court should occupy when, during the Civil War, Congress provided for a tax on incomes, including the salary of federal judges. In a letter of protest to the Secretary of the Treasury, after calling attention to the constitutional provision that salaries of federal judges shall not be reduced during their continuance in office, he said, "The Act in question, as you interpret it, diminishes the compensation of every Judge three per cent.; and if it can be diminished to that extent by the name of a tax, it may, in the same way, be reduced from time to time at the pleasure of the Legislature."[24]

[22] *Ibid.*, 521.

[23] *Ex parte Merryman*, Campbell's Reports, 260.

[24] Tyler, *op. cit.*, p. 432.

Then he pointed out the reasons why the maintenance of judicial independence was of vital importance, saying:

> The Judiciary is one of the three great departments of the Government created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the other departments. And in order to place it beyond the reach, and above even the suspicion, of any such influence, the power to reduce their compensation is expressly withheld from Congress and excepted from their powers of legislation. . . . For the articles which limit the powers of the Legislative and Executive branches of the Government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a Judiciary to uphold and maintain them which was free from every influence, direct or indirect, that might by possibility, in times of political excitement, warp their judgments.[25]

This argument for the independence of the judiciary is an excellent statement of Taney's conception of the position which the courts should occupy. Agents of the sovereign people, they should be beyond political influence or popular excitement as they apply the sovereign will to controversies that come before them, whether in relation to powers of government or individual rights. This feeling was part of his deeply rooted belief in the supremacy of the law.

Democracy

That Taney was a firm believer in individual rights is evidenced by the Dred Scott opinion and by his wartime decisions involving individual liberty.[26] And yet, apparently there were no individual rights which he considered beyond the reach of the sovereign power constitutionally expressed. His

[25] *Ibid.*, pp. 432-33.

[26] *Ex parte Merryman,* Campbell's Reports, 524 (1861); *United States v. Guillem,* 11 Howard, 47 (1850); *Mitchell v. Harmony,* 13 Howard, 115 (1851).

defense of individual liberty was always of liberty established by law. He never based his defense on natural rights.

How could a lover of liberty entrust such transcendent power to the state? The answer, in Taney's case, lies in the deep rooted democracy of his political faith. He had a firm belief in the ultimate wisdom of the people. He was willing to trust the state with power because it was his conviction that the will of the people as constitutionally expressed would not endanger the individual's welfare, but rather conserve it. In 1833, in connection with the Bank struggle, he wrote to Jackson urging a course of action that would put the issue squarely before the people, saying, "I rely at all times with confidence on the intelligence and virtue of the people of the United States, and believing it to be right to remove the Deposites, I think they will sustain the decision."[27] In 1836, several months after he had become Chief Justice he wrote to Jackson saying that he thought the great majority of the people of the United States "will never barter their liberties for money nor shrink before the frowns of the moneyed aristocracy."[28]

Even after his experience in the Merryman case when the Constitution had been ignored by the military forces of the government, apparently with the tacit approval of public opinion, Taney regarded the aberration as only temporary. In 1863 he wrote to a friend, "At my advanced age, I can hardly hope to see the end of the evil times on which we have fallen. But I trust you will live to see the civil power restored in Maryland to its supremacy over the military, and the homes and firesides of its citizens once more safe under the protection and guardianship of law."[29]

It was only after constitutional government had been suspended by military force that Taney's political expressions

[27] *Correspondence of Andrew Jackson*, V, 148.
[28] *Ibid.*, p. 431.
[29] Tyler, *op. cit.*, p. 458.

were pessimistic, but even then he looked forward to the time when the supremacy of the law would again be established. When one has an abiding faith in democracy and the wisdom of the people, he is willing to trust the state with power. It is only illegal power that seems dangerous to the believer in democracy.

Conclusion

In our time perhaps more than at any other period since he lived, Taney's thought has a particular interest in connection with everyday affairs. Democracy, the powerful state, human liberty—these were the high points in his political philosophy. Are they irreconcilable? In a world that is full of dictatorships it is easy to answer in the negative. Taney's own experience in the Merryman case may seem at first glance to demonstrate the fallacy of his faith in the concomitant nature of liberty and authority in a democracy under a reign of law. In a crisis the Constitution and the law were easily brushed aside at the order of the chief executive elected by the people. Taney's answer to this indictment of his faith must have been that the lawless encroachment on individual rights was not the sovereign expressing itself, but government officials usurping power. And he might have said, as Thomas Jefferson did under similar circumstances, "A little patience and we shall see the reign of witches pass over . . . and the people recovering their true sight, restoring their government to its true principles."[30]

In time of peace the encroachment of government on the affairs of individuals is less spectacular. We have gone a long way from the laissez faire ideas which prevailed in the early days of the industrial revolution. The trend toward social thinking was beginning to be noticeable in Taney's time.

[30] Jefferson to John Taylor, June 1, 1798, *The Writings of Thomas Jefferson*, VII, 265.

Already the legislatures were setting about the alleviation of some of the inhuman practices of the machine age, and the courts were allowing them increasing leeway. Chief Justice Taney was one of the pioneers in judicial liberalism toward legislation for the social welfare. Since his time there has been a powerful trend toward more state control in every phase of life. Sociologists, economists, and statesmen are emphasizing social rights and obligations. Socialism has made rapid headway in recent years, so that the socialized state, already in existence in a number of countries in the world, seems not such a remote possibility in the United States. Everywhere governments are assuming more responsibility for the character of their peoples, and more power over their lives.

A modern school of political scientists, in reaction against the tendency to make the state omnipotent, have attacked the theory of state sovereignty, a theory once as unquestioned in political science as Newtonian principles in physics or the Ten Commandments in the Christian faith. Professor Laski argues that "it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered."[31] If there is something dangerous to human personality in the powerful state there can be little doubt as to the correctness of his view. There is a possibility, however, that the dangers to individual liberty which Laski and the other pluralists fear are dangers which result from tyranny of government and not necessarily from tyranny of the state. Taney would doubtless say that the answer lay in more democratic control of the state through the medium of constitutional expression. More democracy, not necessarily less state authority.

But it may be that actual democracy is impossible in the giant modern state. Walter Lippmann has aptly suggested that the ordinary citizen knows from experience that he is

[31] Laski, *A Grammar of Politics*, pp. 44-45.

not really a sovereign.[32] Lippmann and John Dewey have, perhaps most forcefully among American writers, called attention to the difficulty of popular government in a nation of over a hundred million people, but both have come back with the hope that a technique can be developed which will make popular sovereignty fact as well as fiction.[33] If the technique cannot be developed, it is possible that the democratic faith of Taney and the other Jacksonians will have to go the way of the flatboats and the stagecoaches which they helped to usher out.

It is difficult to measure Taney's influence on either his age or our own. It is perhaps most discernible in the trend toward state protection of the social welfare. Taney's influence on the Supreme Court was in a number of important respects a liberalizing one. His Jacksonian democracy went too deep for it to have been otherwise. Only when the clash between capitalism and the planting system came to a climax which threatened to destroy the Union did he find himself on the conservative side. His chief contribution to constitutional law was in the field of the liberalization of the police power, a result of his belief in the paramount nature of the general welfare and the sovereignty of the state.

[32] *The Phantom Public*, p. 14.

[33] John Dewey, *The Public and Its Problems;* Walter Lippmann, *The Phantom Public, Public Opinion.*

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